Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STATE OF SOUTH DAKOTA; CITY OF OACOMA, SOUTH DAKOTA; LYMAN COUNTY, SOUTH DAKOTA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; AURENE MARTIN, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS; BILL BENJAMIN, ACTING REGIONAL DIRECTOR, GREAT PLAINS REGIONAL OFFICE, BIA; CLEVE HER MANY HORSES, SUPERINTENDENT, LOWER BRULE AGENCY, BIA; JAMES McDIVITT, DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

25 U.S.C. § 465 allows the Secretary of the Interior to acquire, in trust, "in his discretion," any amount of "lands" at any location in the Nation, on or off the reservation, for the purpose of "providing land for Indians." In this case, the Secretary seeks to acquire, in trust, 91 acres of off reservation land partially within the City of Oacoma, South Dakota. The Question Presented is:

Whether 25 U.S.C. § 465 is an unconstitutional delegation of legislative power?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the State of South Dakota, the City of Oacoma, South Dakota, and Lyman County, South Dakota, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.[1]

OPINIONS BELOW

The opinion of the Eighth Circuit under review is reported at 423 F.3d 790 and reproduced here in the Appendix (App.) at 1. The order denying hearing and rehearing en banc of the court of appeals is reproduced at App. 138. The opinion of the district court granting summary judgment to Respondents is reported at 314 F. Supp. 2d 935 and reproduced at App. 25. The April 6, 2000, Memorandum of the Director, Office of Trust Responsibilities, through the Deputy Commissioner of Indian Affairs, to the Assistant Secretary-Indian Affairs, is reproduced here at App. 125. The April 6, 2000, Memorandum of Assistant Secretary-Indian Affairs to the Great Plains Regional Director essentially adopting the document identified in the previous sentence is reproduced at App. 124. The January 18, 2001, Memorandum from the Director, Office of Trust Responsibilities, through the Deputy Commissioner of Indian Affairs to the Assistant Secretary-Indian Affairs is reproduced at App. 118. The January 18,

[1] Petitioners note that another case pending before this Court raises the virtually identical issue as this case. *Utah v. Shivwits Band of Paiute Indians*, No. 05-1160 (Petition for Writ of Certiorari filed Mar. 9, 2006).

2001, Memorandum of the Assistant Secretary-Indian Affairs to the Deputy Commissioner of Indian Affairs essentially adopting the document identified in the previous sentence is reproduced at App. 116.

This controversy has been before this Court on a prior occasion. The opinion of this Court granting certiorari, vacating the circuit court decision, and remanding in the prior case is reported at 519 U.S. 919 and is reproduced at App. 57. The opinion of the Court of Appeals for the Eighth Circuit is reported at 69 F.3d 878, and reproduced at App. 64. The order denying rehearing and rehearing en banc is reproduced at App. 63. The district court decision is unreported and is reproduced at App. 94.

JURISDICTION

The Judgment of the Eighth Circuit in this litigation was entered on September 6, 2005, the same day the opinion was filed. App. 1. Rehearing and rehearing en banc were denied on February 6, 2006. App. 138. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which

shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 3 of the Constitution gives Congress authority "[t]o regulate Commerce . . . with the Indian Tribes."

25 U.S.C. § 465 provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisitions, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, that no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392),

as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

STATEMENT OF THE CASE

In 1990, the Lower Brule Sioux Tribe requested that the Department of the Interior place 91 acres of off reservation land owned by the Tribe into trust status. According to the United States, at that time the federal government held over 100,000 acres in trust status for the Lower Brule Tribe and its members. 1995 Petition for a Writ of Certiorari, at 8 n.3. Another 13,200 acres were owned by the federal government on the Lower Brule Reservation for tribal use. *Id.* The 1990 Indian population of the Lower Brule Reservation was 994. U.S. Census, Summary Population and Housing Characteristics, South Dakota, at 175 (1990). Thus, at the time of the application the United States held over 100 acres of land in trust for each Indian man, woman, and child on the Lower Brule Reservation.

The tribe in its 1990 application asserted that it intended to use the property as an industrial park. App. 110. The State and City objected, arguing that placing the land in trust would create civil and criminal jurisdictional problems, would result in the loss of taxes to the communities, and arguing that gaming may be the real purpose of the acquisition. App. 96-97. The Department of the Interior nonetheless approved the 91-acre off reservation acquisition. The State and City thereafter filed suit in federal court on July 13, 1992. Four months later, on November 30, 1992, the agency took the land into trust on

behalf of the tribe. App. 103. The State and City continued to press the claims they had made before the agency, and argued further that the statute lacked ascertainable standards and so violated the delegation doctrine. The district court, sua sponte, ruled that the action was required to be dismissed because the Quiet Title Act, 28 U.S.C. § 2409a, prohibited challenges to federal title to Indian trust lands. App. 106. The district court also ruled that 25 U.S.C. § 465 did not violate the delegation doctrine because the "context in which section 465 was passed clearly delineates the general policy to be applied and the bounds of that delegated authority." App. 113. The court explained further that the purpose of the statute was to "acquire land for Indians to help reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more self-sufficient, both economically and otherwise." *Id.*

The Eighth Circuit reversed. App. 64. As to the constitutional issue, the Eighth Circuit concluded that 25 U.S.C. § 465 provided for "unrestrained power" (App. 77) and that there were

> no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be 'for Indians.'

App. 70. The court found further that the language of the statute would permit the Secretary to acquire a "factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe" and that its "literal terms" allowed the purchase of the Empire State Building in trust. *Id.* The court concluded that 25 U.S.C. § 465, as enacted, resulted in "an agency fiefdom, whose boundaries were never

established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles." App. 77.

The court of appeals further explained that the "legislative history of § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.'" App. 72. Rather, the legislative history showed that Congress sought to provide "rural lands suitable for farming, grazing, and logging by Indians." App. 74. Representative Howard, a chief sponsor, explained that Section 5 would allow acquisitions for "'agricultural,'" "'stock grazing or forestry operations.'" 78 Cong. Rec. 11,730 (June 15, 1934) *quoted at* App. 73. The court observed that, nonetheless, "Congress failed to include standards [in Section 465] to reflect its limited purpose" (App. 73) and the "Secretary has responded by asserting all of the unlimited power conferred by the statute's literal language." App. 74. The court pointed further to the jurisdictional disarray promoted by the statute, finding that Congress in Section 465 determined only "one intergovernmental issue" – taxation – and left the civil and police power jurisdictional issues to be fought out between the BIA and the City and the State. App. 74-75. The result, according to the court, was a "legislative void." App. 75. The court found that the extent to which lands taken into trust are freed from the restraints of the State and local police power should be determined in the first instance by Congress, "not the BIA, and indeed not the courts. . . ." *Id.*

Judge Murphy dissented on the constitutional question, finding that it was reached prematurely and that, in any event, the "text" of the statute, its "historical context," and its "legislative history" provided sufficient boundaries. App. 79, 83-84. Judge Murphy nonetheless would have

reversed the holding of the trial court with regard to the Quiet Title Act, finding that it does not prevent a litigant from challenging, under the Administrative Procedures Act, a decision to take land into trust. App. 92-93. The federal Petition for Rehearing and Rehearing En Banc was denied. App. 63. Of the eleven active judges, four would have granted rehearing. *Id.*

The Department of Interior thereupon sought to save the statute, filing a Petition for Certiorari and promulgating an emergency rule "[i]n response" to the 1995 decision of the Eighth Circuit. 61 Fed. Reg. 18,082 (Apr. 24, 1996). The emergency rule provided that the Secretary would take land into trust only thirty days after a final decision had elapsed. *Id.* In addition, the United States backtracked on the argument it had previously successfully made in the lower courts that acquisitions under Section 465 were unreviewable under the Administrative Procedures Act because such acquisitions were "committed to agency discretion" by law. 5 U.S.C. § 701(a)(2). 1995 Petition for Writ of Certiorari, at 24. *See Florida Dep't of Business Regulation v. Dep't of Interior*, 768 F.2d 1248, 1255-57 (11th Cir. 1985). Based on its new regulation and on its admissions, the United States asked this Court to vacate the determination of the Court of Appeals for the Eighth Circuit and to send the case back to the Secretary. This Court granted the request. *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996). App. 57. Justices Scalia, O'Connor, and Thomas dissented, commenting that the decision to "grant, vacate and remand in light of the Government's changed position" was "unprecedented and inexplicable." 519 U.S. at 921. App. 59. The dissenters

noted that they failed to apprehend "how the availability of judicial review has anything to do" with whether or not the IRA impermissibly delegated legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). App. 60.

The Department of the Interior thereafter formally removed the land from trust status and the tribe filed an amended application that the off reservation land be taken into trust, essentially proposing that trust status was necessary to develop a "Circle of Tipis" as part of a Native American scenic byway. Administrative Record (AR) 129, 236-37.

The State, in opposition, submitted evidence that placing land in trust was not economically beneficial as claimed because trust status increases the cost of management decisions and the restrictions on alienation constrain the use of land as collateral in capital markets. AR 331-32. *See* Terry Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians*, 121-24 (1993). The State raised again its concern that placing land into trust causes jurisdictional conflicts (AR 336-37), that the tribe's purpose in using the land was indefinite (AR 334), and that the tribe most likely had not disclosed that its real purpose was gambling. AR 341-43. The City argued that the grant of trust status to the tribe would create an "artificial barrier stifling the natural growth of the community," which is already confined by other factors (AR 619-21) and both local units of government expressed concerns relating to lost taxes and unfair competition. AR 627-28.[2]

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[2] During the process, on December 15, 1998, Governor Janklow told Interior that "[b]ased on their new business plan" and the assurance that the tribe would not engage in gaming, "we" supported the tribe's

(Continued on following page)

Thereafter, the Director, Office of Trust Responsibilities, on April 6, 2000, forwarded a memo through the Deputy Commissioner of Indian Affairs to the Assistant Secretary-Indian Affairs, in which he advised taking the Oacoma land into trust (App. 125), and a notice was published in the Federal Register on May 18, 2000, of intent to take land into trust. AR 1409.

On June 16, 2000, South Dakota, the County, and City filed a Summons and Complaint in federal court. The Complaint asserted the unconstitutionality of the Act on delegation grounds, attacked the lack of compliance with the National Environmental Policy Act and challenged the compliance of the agency with its own regulations.

After the Complaint had been filed, the BIA backed up once again, and retreated from its stance that no environmental assessment need be done. The district court granted the BIA's motion for extension of time to allow it to conduct an environmental review, which was finally issued on December 14, 2000.

Two days before George W. Bush took the oath of office as President of the United States, on January 18, 2001, the Assistant Secretary-Indian Affairs, ratified the April 6, 2000, decision taking 91 acres of land in Lyman County

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"application for trust status." AR 827. Five months later, the tribe reversed its stance on land use and told the BIA that there "will be no immediate change in land use of the Oacoma land." AR 831. The BIA Realty Specialist in Washington, DC, alertly asked the local BIA if the Governor had been "informed of the change in land use" and asked "does he still support the application?" AR 976. The record does not reveal any further inquiry of the Governor, *see* AR 979. In any event, no question has been raised relating to the authority of the Attorney General to pursue its attack on the acquisition and Governor Michael Rounds supports this Petition.

into trust for the Lower Brule Sioux Tribe. App. 116. On January 26, 2001, the notice was printed in the Federal Register. 66 Fed. Reg. 7,925 (Jan. 26, 2001). AR 1566.

After the completion of the environmental review and the publication of the notice in the Federal Register, the case was allowed to proceed in district court. The district court upheld the Secretary's decision and rejected the nondelegation challenge, finding four factors which limited the Secretary's authority sufficiently to defeat a constitutional attack. First, the district court found that the policy of "acquisition of lands for Indians" served the purpose of "'conserv[ing] and develop[ing] Indian lands and resources'"; second, the Secretary was limited in that he may "only provide land for Indians"; third, the Secretary was limited by the $2 million that can be appropriated to acquire such land; and fourth, the Secretary could not use any funds to acquire land for Navajos outside of the Navajo Indian Reservations in Arizona and New Mexico. App. 53. The district court found similarities between the Clean Air Act, which permitted the "Administrator to set air quality standards that 'are requisite to protect the public health,'" and the IRA which "permits the Secretary to acquire land in trust for Indians 'to conserve and develop Indian lands and resources.'" App. 55. The district court also indicated that the "Circle of Tipis" had been built on the land proposed to be taken into trust. App. 34, 45.

The court of appeals affirmed. App. 1. The court found that this Court had struck down statutes on "delegation grounds on only two occasions." App. 6. Those statutes, according to the court, had been enacted in a "unique

political climate and delegated to the President exceptionally broad control over the national economy." App. 7.

The court of appeals found that, following the two decisions striking down statutes on delegation grounds, this Court had given "'narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'" App. 7 (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989)). The court relied on what it perceived as similarities between this case and this Court's decision in *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-17 (1943) in which this Court had found an "intelligible principle" in the requirement of the Act that the "agency should promulgate regulations encouraging effective use of radio in the 'public interest, convenience or necessity.'" App. 7-8. The court also relied heavily on the dissent of Judge Murphy in 1995 to find "guidance" in the "language of § 465." App. 12. According to the court, such "guidance" was found in the text to the Act directing that "'any land acquired must be for Indians'" and in that it "'authorizes the appropriation of a limited amount of funds with which land could be acquired and specifically prohibits use of such funds to acquire land for Navajo Indians outside of their established reservation boundaries.'" App. 12. The court rejected the State's arguments that the "textual limitations are artificial because any acquisition could be seen as 'for Indians,' regardless of who it harmed." App. 12. The court also rejected the State's arguments with regard to funding. The court acknowledged that the statute's funding limits are presently "irrelevant," but stated that they were not "meaningless when the IRA was enacted." App. 12.

The court of appeals also found meaning in the legislative history of the Act. App. 12. The court found that the "legislative history frequently mentions landless Indians" (App. 13), but did not "believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians." App. 13-14. The court also acknowledged that members of Congress believed that "giving land to landless Indians would enable them to farm or work in stock grazing or forestry operations" but found further that the "statutory language and the expressions of purpose for section 5 in the reports indicate that Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support." App. 14.

The court of appeals thus

> conclude[d] that an intelligible principle exists in the statutory phrase 'for the purpose of providing lands for Indians' when it is viewed in the statutory and historical context of the IRA. The statutory aims of providing land sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to the Department.

App. 14.

The State, County, and City petition for rehearing and rehearing en banc was denied, with Chief Judge Loken and Judge Gruender dissenting. App. 138.

REASONS FOR GRANTING CERTIORARI

> *According to [John] Locke, one of the four unbreachable boundaries confining legislative authority was that: "The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . .*[3]

> *It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.*[4]

This case stands at the intersection of the nondelegation doctrine and federalism. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), this Court's most recent delegation determination, illuminates the relationship between those bedrock principles of American law. *Whitman* held that "the degree of agency discretion that is acceptable varies according to the scope of power constitutionally conferred." *Id.* at 475. An environmental regulation defining the term "'country elevators'" needs no "direction" but the promulgation of air standards that "affect the entire national economy" requires "substantial guidance." *Id.* In other words, a statute without standards, which allows a federal officer to massively and unilaterally intrude into the jurisdiction of the states, offends the constitution.

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[3] Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 4 (1982) (quoting J. Locke, *Two Treatises of Government*, 380-81 (2d Treatise) (Cambridge University Press 1960)).

[4] *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

25 U.S.C. § 465 is such a statute; it allows the Secretary of the Interior, "in his discretion," to acquire any lands, on or off the reservation, at any place within the United States, and in any amount, without reference to any limiting standard. That the statute is so bereft of standards that it embodies an unconstitutional delegation of legislative power is most clearly demonstrated by the failure of the federal government to respond to the State's claim, made repeatedly since the mid-1990s, that the statute is so vague that it is impossible to determine whether the Secretary could "acquire all or any part of the City of New York, the City of St. Louis, [or] the City of Rapid City . . . in trust." Appellants' Brief, *State of South Dakota and City of Oacoma v. United States Department of the Interior*, U.S. Court of Appeals for the Eighth Circuit, Civil No. 94-2344, at 42.

Moreover, the intrusion into state sovereignty through the acquisition power poses deep threats to federalism. The taking of land into trust deprives the states and local units of government of the authority, under the text of the statute, to tax the land; it also deprives them of the authority, under 25 C.F.R. 1.4(a), to impose any law or ordinance "zoning or otherwise governing, regulating or controlling the use of or development of any real or personal property, including water rights." To some courts, moreover, taking land into trust converts it to "Indian country" under 18 U.S.C. § 1151 with all that status entails. The potential amount of land which is subject to these intrusions is virtually limitless. Tribes now have available to them billions in casino revenues with which to purchase lands in each village, town and metropolis.

The Court of Appeals for the Eighth Circuit in the present litigation, along with both the First and Tenth

Circuits, inexplicably ignored the force of *Whitman's* guidance and treated the delegation doctrine as a deceased and not very beloved distant relative. *See Carcieri v. Norton*, 423 F.3d 45, 56-58 (1st Cir. 2005); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W 3532 (U.S. March 9, 2006) (No. 05-1160). This Court's attention is necessary to affirm the vitality of the doctrine.

I. 25 U.S.C. § 465 IS SO DEVOID OF ASCERTAINABLE STANDARDS THAT IT EMBODIES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY TO THE EXECUTIVE BRANCH.

25 U.S.C. § 465 provides, in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire . . . lands, within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year, *Provided* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians. . . .
>
> . . .
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired,

> and such lands or rights shall be exempt from State and local taxation.

Article I, Section 1 of the Constitution vests "[a]ll legislative Powers" in "a Congress of the United States." This Court accordingly has "long . . . insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). The doctrine requires that Congress articulate the "general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946). Most recently, this Court has rearticulated the principle that when "Congress confers decision making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

25 U.S.C. § 465 fails the test of the cases. It lacks a "general policy," an "intelligible principle," and "boundaries." The text, by its plain terms, purports to vest in the Secretary unbridled "discretion" to acquire "lands" for a tribe or an Indian on or off reservation, setting (1) no limits on the location of lands, allowing, for example, an acquisition for a South Dakota tribe in Alabama, Missouri, New York or Utah; (2) no limits on the extent of such acquisitions, allowing the Secretary to take the whole of a city or even the whole of the state into trust for an individual Indian or a tribe; and (3) no limits on the purpose of such acquisitions, from golf courses, strip mines, strip malls, strip joints, to urban apartment complexes.

A. The Text of 25 U.S.C. § 465 Provides No Boundaries.

Tracking Judge Murphy's dissent in the 1995 litigation, the court of appeals found "guidance" and "textual limitations" in the "language of § 465." App. 12. The court of appeals cited three such purported "limitations" in the text of the statute. First, court found that the scope of the statute was limited because acquisitions could be only "'for Indians.'" *Id.* The court did not explain, however, why it believed this to be a meaningful "boundary" or "limit." And it is difficult to see how it could be. That the land be acquired "for Indians" in no way limits the discretion of the Secretary to engage in the conduct at issue – acquiring land in trust for Indians. Nor does the "for Indians" language place a practical limit on the exercise of the Secretary's power under § 465. The United States has estimated the total number of American Indians and Alaska Natives at 4.4 million as of 2003. usinfo.state.gov/eur/Archive/2005/Jan/28-691277.html. If even half of these are "Indians" as defined by federal law, then 2.2 million persons are eligible to have land taken in trust for them, along with over 500 federally recognized tribal governments. *See id.*

Second, the court relied on the statutory limit of $2 million per year for the "acquisition" of lands. App. 12. As the court recognized, however, the limit is "irrelevant" because "most of the land currently taken into trust has been previously purchased by a tribe." App. 12. Indeed, the Department of Interior has acknowledged that the only way it has acquired land in trust under the statute since 1950 is when a tribe or individual has purchased land and

conveys it to the United States. 64 Fed. Reg. 17,576 (Apr. 12, 1999). The court nonetheless found the "limit" to have legal significance, stating that "[w]e disagree that these limitations were meaningless *when the IRA was enacted*. . . ." App. 12 (emphasis added).

Petitioners understand that the court is here expressing the theory that a statute which is constitutional when adopted cannot thereafter become unconstitutional as practical conditions change. This approach is without merit because the constitutional defect in 25 U.S.C. § 465 has been there from the first. The text of 25 U.S.C. § 465 has always allowed the Secretary to acquire land without cost to himself by "relinquishment [or] gift." Moreover, it makes no sense to argue that a statute which was once constitutional is always constitutional. For example, a state could apportion its legislature in an entirely constitutional manner; years later, as the population grows in some sections and shrinks in others, the formerly constitutionally apportioned legislature could certainly become unconstitutional. *See also Whitman*, 531 U.S. at 475 (identifying practical considerations for evaluating claims of the grant of excessive power to the executive).

The third point of Judge Murphy as quoted by the court is closely related to the second – the $2 million could not be used to acquire land for the Navajos outside of their reservation boundaries in Arizona and New Mexico. App. 12. This again provides no boundaries for the reasons set forth above, and for the additional reason that hundreds of other tribes and roughly two million individual Indians are eligible for acquisitions in the area outside of the Navajo reservation in Arizona and New Mexico. The court

of appeals does not, nor could it, explain how excluding one tribe from one use of the funds could possibly narrow the Secretary's untethered discretion to take land into trust anywhere in the country for all other tribes and Indians.

B. The Legislative History of 25 U.S.C. § 465 Fails to Create a Constitutionally Sufficient "Intelligible Principle" or Constitutionally Sufficient "Boundaries."

The court of appeals also relied heavily on the legislative history to establish the constitutionally demanded standards, but its approach lacks merit. First, the very statement of the nondelegation doctrine denies reliance on legislative history. According to *Whitman*, 531 U.S. at 472, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Legislative history is assuredly not a "legislative act" laid down by "Congress." *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, ___ U.S. ___, 125 S.Ct. 2611, 2626 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history.").

Second, the court of appeals rejected the clearest and most unequivocal messages of the legislative history. The court of appeals, for example, properly acknowledged the frequent references in the legislative history to the purchase of land for "landless Indians." App. 13-14. Moreover, the court of appeals acknowledged that the "most common application of the statute" was envisioned to be "giving land to landless Indians [which] would enable them to farm or work in stock grazing or forestry operations." App. 14. Yet, this central thread of the legislative history was

rejected as limiting the authority of the Secretary – neither the text of the act nor the court below suggests that the statute is limited to providing land for landless Indians or that acquisitions are confined to those for farms, stock grazing or forestry.

Instead of taking the smaller step of simply adopting, as the limits of the statute, the finite purposes it identified, the court determined to rewrite the statute with much broader purposes untethered by the central threads of the legislative history. Relying on unspecified "statutory language" and on "expressions of purpose for section 5 in the reports," the court concluded that the "statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy" formed the boundaries of the operation of the statute and "sufficiently narrow[ed] the discretionary authority granted to the Department." App. 14.

There are three major problems with the court's approach. First, Section 465, as rewritten by the court, still lacks an "intelligible principle" and constitutionally adequate "boundaries." Under the court's decision, the Secretary would still be allowed to purchase, on behalf of a small South Dakota tribe, land up and down the boundaries of Central Park in New York City, or land in Alabama, Missouri or Utah for a golf course, apartment complex, or strip joint. Virtually any acquisition of land in trust for Indians could benefit them economically and thereby "enable Indians to achieve self-support"; further, even a BIA land acquisition that somehow does not accrue to an Indian's "self-support" can be seen as "ameliorating the damage resulting from the prior allotment policy."

Second, the attempt of the court below to rely on legislative history was deficient in that it ignored entirely the development of the legislation. The original bill which was to constitute the IRA provided for Indian lands in Title III. *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., 8 (1934) (hereinafter House Hearings). Section 1 of Title III set out a detailed declaration of policy. *Id.* Section 6 of Title III required the Secretary to "make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals" and to make "such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands." *Id.* at 8-9. He was further to classify areas which were "reasonably capable of consolidation" and to "proclaim the exclusion from such areas of any lands not to be included therein." *Id.* at 8. Section 8 allowed the tribe to acquire the interest of any "nonmember in land within its territorial limits" when "necessary for the proper consolidation of Indian lands." *Id.* at 9. Under Section 16, the lands were not to be subject to taxation "but the United States shall assume governmental obligations of the State or county in which such lands are situated with respect to the maintenance of roads across such lands, the furnishing of educational and other public facilities," for fire control and protection of the public health and order in the lands and for other purposes. *Id.* at 11. Jurisdictional measures were provided in Title IV.

The original bill thus at least made an attempt at articulating basic policy choices and imposing real boundaries. Nonetheless, these policy choices and boundaries were

resoundingly rejected by Congress, and the bill was entirely rewritten by those "who objected most strenuously to the original" bill. 78 Cong. Rec. 11,732 (June 15, 1934). *Compare* House Hearings at 1-14 *and* 48 Stat. 984 (1934). The detailed statement of general policy for the Act as a whole set out in the original Title I, Section 1 was eliminated. Section 1 of Title III, which had set out a comprehensive land policy, was entirely deleted, along with Section 6 of which had provided for the "orderly and sound acquisition and consolidation of lands." Section 7 of Title III, the predecessor to 25 U.S.C. § 465, was stripped of standards and renumbered Section 5. The language of Section 8 of Title III, quoted above, was eliminated.

Furthermore, Section 16 of the original Title III was essentially eliminated and Congress put in limbo the question of whether it would "assume . . . governmental obligations of the state or county" with regard to any newly acquired lands. Of course, states continue to expend significant funds for schools, roads and social services in areas with high proportions of nontaxable trust land. Likewise, the detailed jurisdictional provisions of Title IV were eliminated. Because Congress deliberately eliminated all intelligible standards from the text of the original bill, it cannot be said that Congress has articulated them in the 1934 legislative history.

C. The Decisions of This Court Give No Support to the Opinion of the Eighth Circuit.

As noted above, the nondelegation doctrine – that Congress may not constitutionally delegate its legislative

Power to another branch of government – derives from Article I, Section 1 of the Constitution: "All legislative Powers granted herein shall be vested in a Congress of the United States." Congress can thus exercise the legislative power "granted herein" but it cannot delegate that power. *Loving v. United States*, 517 U.S. 748, 758 (1996). Nor does either of the other branches have an independent constitutional claim to legislative power.

This Court accordingly has struck, on nondelegation grounds, two statutes enacted by the same Congress which enacted Section 465. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In each case, the 1934 Congress had failed to "articulate any policy or standard that would serve to confine the discretion of authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7.

Similarly, when Congress in 1934 enacted Section 465, it failed to articulate any such policy or standards to "confine the discretion" of the authorities to whom it had granted power. Indeed, it is significant, and perhaps dispositive under *Mistretta*, that each acquisition under Section 465 is made by the Secretary, in the words of the statute, "in his discretion."

The most recent reaffirmation of the nondelegation doctrine declares anew that, to survive constitutional scrutiny, the "'legislative act'" must lay down an "'intelligible principle to which the person or body'" must conform. *Whitman*, 531 U.S. at 472. Such an intelligible principle was found within the text of the statute at issue

in *Whitman* in that it (1) required that the EPA establish "'uniform national standards at a level that is requisite to protect the public health from the adverse effects of the pollutant in ambient air'"; (2) confined the EPA authority to a "'discrete set of pollutants'" and (3) required that the EPA analysis be based on "'published air quality criteria that reflect the latest scientific knowledge.'" 531 U.S. at 473. Further, the term "requisite" confined the scope of the action to "sufficient but not more than necessary." *Id. See* 42 U.S.C. § 7409.

In contrast, the court below relied on the virtually meaningless "statutory phrase 'for the purpose of providing land for Indians'" to find an "intelligible principle" (App. 14) and the lynchpin of its analysis seemed to be the thesis that cases such as *National Broadcasting* established that key phrases in a statute can provide such a principle. App. 7-8. The court below, however, missed the meaning of that decision.

In *National Broadcasting*, 319 U.S. at 215-17, the Court did not rely on the bare phrase "public interest" as setting the boundaries and meaning of the licensing authority which could be exercised. The scope of permissible authority was further defined, by the text of the statute, to be "the interest of the listening public 'in the larger and more effective use of radio.'" 319 U.S. at 216 (quoting Section 303(g) of the Act.) Statutory language also required that "'licenses, frequencies, hours of operation'" should be divided, among the "'States and communities'" so as to "'provide a fair, efficient, and equitable distribution of radio service.'" 319 U.S. at 215 (quoting Section 307(b)). Moreover, the phrase "public interest"

carried with it meaning from the case law: "'An important element of public interest and convenience affecting the issuance of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.'" 319 U.S. at 216 (quoting *Federal Communications Comm. v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). *See also Federal Communications Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) ("relative advantages in service" part of public interest test).

Neither *Whitman* nor *NBC* give support to the thesis that meaning can be inserted into an ambiguous phrase of a statute by vague passages of legislative history. Rather, statutory text and prior cases defining particular terms of art can provide constitutional meaning sufficient to overcome a delegation challenge. No text or prior cases do so with respect to 25 U.S.C. § 465.

II. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENT.

In *Whitman*, this Court made clear that the broader the scope of power in question, the more guidance Congress must provide to the executive branch to satisfy the nondelegation doctrine. 531 U.S. at 475. Few powers are broader, or strike more at the heart of our federal system of government, than the Secretary's unbridled power to take land into trust "for Indians."

Under 25 U.S.C. § 465, the Secretary of the Interior is allowed discretionary authority to unilaterally invade the

jurisdiction of the State and permanently deprive it, not only of its taxing authority under the text of the statute, but also of the very substance of its jurisdictional authority. The BIA claims, in 25 C.F.R. 1.4(a), that the acquisition of land in trust deprives the states and localities of their ability to zone, govern, regulate, or control the use of or development of any real or personal property, a devastating attack on state and local authority when the land is off reservation. Some courts have gone further and found that the acquisition of off reservation land in trust converts that land into "Indian country." *See, e.g., United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999).[5]

The location of land, moreover, which could be taken into trust is virtually unlimited. As noted above, South Dakota has time and again given opportunities to the United States government to deny that acquisitions for a small South Dakota tribe of land at various places around the country, including land around Central Park in New York City, would somehow be forbidden. The United States cannot and will not deny that acquisitions of land for any purpose at any location for any tribe or Indian are forbidden under the Act. They are, in fact, all within the "discretion" of the Secretary of the Interior, under his view.

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[5] The question is unresolved in the Eighth Circuit. One federal district court has recently found that placing off reservation land in trust converts it into Indian country. *South Dakota v. Department of the Interior*, 401 F. Supp. 2d 1000, 1010 (D.S.D. 2005) (appeal pending). The Court of Appeals for the Eighth Circuit, however, has not, in the view of the State, yet acquiesced in that position. *United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997).

Nor does the text of the statute restrain the amount of land which can be taken into trust. In 1999, the Department of the Interior estimated an annual number of on reservation applications for land in trust at 6,594 and off reservation trust acquisitions at 278. 64 Fed. Reg. 17,575 (Apr. 12, 1999). In that year, however, gaming revenues were but 9.8 billion; 2004 revenues were 19.4 billion, a doubling of the 1999 revenues. *See* www.nigc.gov/TribalData/GamingRevenues20031999/tabid/106/Default.aspx; www.nigc.gov/TribalData/GamingRevenues20042000/tabid/549/Default.aspx. This huge, and rapidly expanding, bonanza from gambling is available to tribes to acquire land in every village, town, and city in the United States. Scholars emphasize the tribal members' understanding of themselves as possessing a special relationship to the land and tribes have begun to and will no doubt markedly increase the rate at which they acquire lands. *See, e.g.*, Frank Pommersheim, *Braid of Feathers*, 33-34 (1995). *See also Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition* (R. Strickland et al. eds., 1982) at 471: "Real estate holdings are the single most important economic resource of Indian tribes." That tribes are able to acquire land wherever they want is fully within the scope of the American dream and the idea fits comfortably with concepts of federalism. When the United States, however, unilaterally takes that land into *trust*, and permanently removes it from the jurisdiction of the State, the intrusion becomes impermissible – at least when the power to unilaterally take that land has been delegated to an executive branch officer.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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423 F.3d 790

United States Court of Appeals, Eighth Circuit.
State of SOUTH DAKOTA; City of Oacoma, South Dakota; Lyman County, South Dakota, Plaintiffs/Appellants,
v.
UNITED STATES DEPARTMENT OF THE INTERIOR; Aurene Martin, Acting Assistant Secretary, Indian Affairs; Bill Benjamin, Acting Regional Director, Great Plains Regional Office, BIA; Cleve Her Many Horses, Superintendent, Lower Brule Agency, BIA; James McDivitt, Deputy Assistant Secretary, Indian Affairs, Defendants/Appellees,
Lower Brule Sioux Tribe, Interested Party.
No. 04-2309.

Submitted: March 14, 2005.
Filed: Sept. 6, 2005.
Rehearing and Rehearing En Banc Denied Feb. 6, 2006.[1]

John P. Guhin, argued, Assistant Attorney General, Pierre, SD, for appellant.

Thomas L. Sansonetti, argued, Assistant Attorney General, U.S. Department Of Justice, Washington, DC (Judith Rabinowitz, Ellen Durkee and Lisa E. Jones, U.S. Department of Justice on the brief), for appellee.

Before WOLLMAN, LAY, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

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[1] Chief Judge Loken and Judge Gruender would grant the petition for rehearing en banc.

The State of South Dakota, City of Oacoma, and Lyman County (collectively referred to as the State) appeal from the district court's[2] grant of summary judgment in favor of the Department of the Interior (the Department), upholding the Secretary of the Interior's[3] decision to use his authority based on section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, to take certain land into trust for the Lower Brule Sioux Tribe. We affirm.

I.

In 1990, the Lower Brule Sioux Tribe sought to have 91 acres of off-reservation land that it had purchased taken into trust. The land is located within the municipal limits of the city of Oacoma, some seven or eight miles south of the Tribe's reservation and adjacent to Interstate 90 near exit 260. The Department approved its request, and the Interior Board of Indian Appeals dismissed the resulting appeal. The State filed a claim in the district court, seeking review of the Secretary's action and contending that 25 U.S.C. § 465 was an unconstitutional delegation of legislative power. The district court concluded that the statute was constitutional, but held that it was without jurisdiction to review the remaining claims and dismissed the case. This court reversed, finding that § 465 constituted an unconstitutional delegation of legislative power. We concluded that the Department had interpreted its own power too broadly and was exercising that

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[2] The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

[3] The Secretary of the Interior at the time the land was taken into trust was Bruce Babbitt. The current Secretary is Gale A. Norton, who took office January 31, 2001.

power in an unchecked manner because it had also interpreted the statute as delegating unreviewable discretionary authority to the Secretary. *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 881-85 (8th Cir.1995) (*South Dakota I*). The Department promulgated a new regulation that provided for judicial review, 25 C.F.R. § 151.12(b), and then petitioned for writ of certiorari, asking that the United States Supreme Court vacate our decision and remand the case to the Department. The Supreme Court granted the writ and vacated the judgment, directing that the matter be remanded "to the Secretary of the Interior for reconsideration of his administrative decision," *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 919-20, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996) (*South Dakota II*), in light of the new regulation allowing for judicial review. Some seven months later, the Department removed the land from trust status.

In 1997, the Tribe submitted an amended application to the Secretary, requesting that the United States take the land into trust on the Tribe's behalf. The Tribe submitted a business plan describing its intent to use the land for a cultural center and tourist attraction that would draw tourists to further explore the South Dakota Native American Scenic Byway.[4] State's App. (App.) 82A-82C. The Bureau of Indian Affairs (BIA) gave notice to state, county, and city officials, requesting information and comments. The State responded by raising the following objections: the statute unconstitutionally delegated legislative authority;

[4] The Tribe also attached a comprehensive plan of the goals for the entire corridor of the Native American Scenic Byway that described everything from the vision for the byway to the management and marketing necessary to accomplish it. Supp.App. 112-275.

the Tribe had not shown its need for the land to be taken into trust; a significant loss in state revenue and numerous jurisdictional problems would result if the land were taken into trust; the distance between the land and the reservation counseled against the acquisition; and the land would likely be used for gaming purposes. The city and county separately objected by alleging that the taking of the land into trust could stifle the growth of the community and affect its income.

In its May 20, 1998, response to the objections, the Tribe asserted that it would benefit from having the land held in trust because of the resulting significant federal protections that would facilitate the growth of tribal industry and would assure the Tribe's future generations the continued use of the land. The Tribe also asserted that because the Tribe's planned use of the land would result in increased tourism, the local governments would suffer no significant revenue loss. The response confirmed that the Tribe's business plan detailed its specific intentions for the land and stated that the Tribe would not use the land for gaming.

The Secretary evaluated the application in accordance with the Department's regulations, basing his conclusion on the information provided by the parties involved and on internal recommendations from various levels within the Department. The Secretary concluded that it would be appropriate to take the land into trust and published notice in the Federal Register.

The State again filed suit in federal court to challenge the agency action.[5] The suit was delayed for the completion of an environmental assessment in accordance with the National Environmental Policy Act, after which the Secretary ratified his decision, finding that taking the land into trust would have no significant impact on the quality of the human environment. The State amended its complaint and filed a motion to supplement the administrative record to provide support for its claim that the Tribe in fact intended to use the land for gaming purposes. The district court denied the motion to supplement the record, finding that the record adequately reflected the facts and concluding that the plaintiffs had not shown bad faith or improper behavior sufficient to justify supplementation. The parties filed cross-motions for summary judgment. The district court granted the Department's motion, once again finding 25 U.S.C. § 465 to be constitutional and holding that the decision to grant trust status was not arbitrary or capricious. *South Dakota v. United States Dep't of the Interior*, 314 F.Supp.2d 935 (D.S.D.2004) (*South Dakota III*). It concluded that the "Secretary's decision satisfactorily addressed all relevant criteria" in its regulations. *Id.* at 948.

II.

We review *de novo* the district court's grant or denial of a motion for summary judgment. *Children's Healthcare Is a Legal Duty, Inc. v. De Parle*, 212 F.3d 1084, 1090 (8th

[5] In July 2001, the Tribe moved to intervene in the State's suit. The district court denied the Tribe's motion for intervention as of right and for permissive intervention, and we affirmed. *South Dakota v. United States Dep't of the Interior*, 317 F.3d 783 (8th Cir.2003).

Cir.2000). Viewing the record in the light most favorable to the nonmoving party, we ask whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Id.* We also review *de novo* questions of constitutional law. *Coalition for Fair & Equitable Regulation of Docks v. Fed. Energy Regulatory Comm'n*, 297 F.3d 771, 778 (8th Cir.2002).

A.

The State first claims that because 25 U.S.C. § 465 does not delineate any boundaries governing the executive's decision to acquire land in trust for Indians, it constitutes an unlawful delegation of legislative power in violation of Article 1, Section 1, of the Constitution ("All legislative Powers herein granted shall be vested in a Congress of the United States."). Congress may delegate its legislative power if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928). The Supreme Court has given Congress wide latitude in meeting the intelligible principle requirement, recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

The Supreme Court has struck down statutes on delegation grounds on only two occasions. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). The statutes at issue in those cases were promulgated in a

unique political climate and delegated to the President exceptionally broad control over the national economy. Section 9(c) of the National Industrial Recovery Act, invalidated in *Panama Refining*, gave the President blanket authority to prohibit transportation of petroleum; neither its language nor its context provided any criteria to guide the President or required any specific findings before he acted. 293 U.S. at 415-16, 55 S.Ct. 241. Section 3 of the National Industrial Recovery Act, struck down in *Schechter Poultry*, authorized the President to prescribe and approve mandatory "codes of fair competition" for various industries without additional congressional approval. 295 U.S. at 521-23, 55 S.Ct. 837. The Court warned that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537-38, 55 S.Ct. 837.

Since 1935, however, the Court has given "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n. 7, 109 S.Ct. 647. The Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (quotation omitted). The Court has made such narrow constructions by rejecting overly broad interpretations of certain words and giving the words content "by their surroundings." *Id.* at 466, 121 S.Ct. 903. The Court has found an intelligible principle, although admittedly broad, even when an act simply stated that an agency should promulgate regulations encouraging the

effective use of radio in the "public interest, convenience, or necessity," noting that the meaning of "public interest" was limited in light of the larger aim of the Act. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215-17, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). Broad phrases of purpose in an act are not "utterly without meaning" when viewed in the light of "the purpose of the Act, its factual background and the statutory context in which [the phrases of purpose] appear." *Am. Power & Light Co. v. Securities & Exch. Comm'n*, 329 U.S. 90, 104, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

Congress fails to give sufficient guidance in its delegations only if it "would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426, 64 S.Ct. 660, 88 L.Ed. 834 (1944). Its will is sufficiently articulated "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power*, 329 U.S. at 105, 67 S.Ct. 133. The statute does not have to provide a "determinate criterion" for the exercise of the delegated power, as long as a policy is articulated. *Whitman*, 531 U.S. at 475, 121 S.Ct. 903.

The IRA's delegation of authority is set forth as follows:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living

> or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465. Section 465 also authorizes the allocation of up to two million dollars each fiscal year for that purpose. *Id.* The State argues that § 465 provides no practical boundaries to the Secretary's authority and that the statute's purposes are so broad that they could be construed to justify almost any land acquisition.

As indicated above, we previously found § 465 to be unconstitutional, *South Dakota I*, 69 F.3d 878, concluding that the statutory language contained "no perceptible 'boundaries,' no 'intelligible principles,'" *Id.* at 882, a fact that, together with the broad agency interpretation, created "an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review." *Id.* at 885. Judge Murphy dissented, stating that the court had unnecessarily reached the constitutional issue instead of reaching the merits of the State's Administrative Procedure Act (APA) claim. *Id.* at 885. She also concluded that the statute contained boundaries sufficient to bring it within the broad range of acceptable delegations because the statute was confined in scope, its text, when viewed in its historical context, limited the Secretary's discretion, and its legislative history revealed its purposes. *Id.* at 887.

Because the Supreme Court vacated our 1995 opinion, we are not bound by its conclusion.[6] Accordingly, we

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[6] The Supreme Court issued what is known as a GVR (granting certiorari, vacating the judgment below, and remanding the case with minimal direction). A GVR does not compel a particular determination or outcome, but occurs often when an intervening development may affect the outcome of the case. *See, e.g., Jackson v. United States*,

(Continued on following page)

reexamine the broader context of the Act to determine whether the delegation in 25 U.S.C. § 465 includes guidance sufficient to withstand a challenge based upon nondelegation doctrine grounds. We may look solely to the language and the context of the statute in determining its constitutionality and may not consider any particular agency interpretation as determinative in our constitutional inquiry.[7] *See Whitman*, 531 U.S. at 472, 121 S.Ct. 903 (stating that "[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"). Whether the agency is reasonably applying its delegated power is an inquiry distinct from the question whether the delegation contains sufficient guidance to pass constitutional muster. We will, if possible, give "narrow constructions to statutory delegations," *Mistretta*, 488 U.S. at 373 n. 7, 109 S.Ct. 647, and then proceed to evaluate the agency action under the APA.

___U.S. ___, 125 S.Ct. 1019, 160 L.Ed.2d 1001 (2005) (issuing a GVR "for further consideration in light of *United States v. Booker*, 543U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)"); *Consolidated Foods Corp. v. Unger*, 456 U.S. 1002, 102 S.Ct. 2288, 73 L.Ed.2d 1297 (1982) ("for further consideration in light of *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)"). *Cf. Republican Party of Minnesota v. White*, 416 F.3d 738, 748 (8th Cir.2005) (en banc).

[7] This principle had not been clearly articulated in the past, as evidenced by our prior opinion and the Department's argument in its petition for certiorari in this case. The Department asked the Supreme Court to vacate and remand the case because our prior opinion was based in part on the lack of judicial review available under the Department's regulations and the fact that the Department had since issued new regulations acknowledging the availability of judicial review. The Department contended that the challenge should be revisited in light of the new regulation.

We conclude that the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust. The IRA, 25 U.S.C. §§ 461-479, enacted in 1934, "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government. . . . " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *see also Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.1978) (highlighting that the various sections of the act all reflected the purpose of ensuring protection of Indian lands).

The Tenth and the First Circuits have both found that § 465 does not violate the nondelegation doctrine. *United States v. Roberts*, 185 F.3d 1125 (10th Cir.1999); *Carcieri v. Norton*, 398 F.3d 22 (1st Cir.2005). In *Roberts*, the Tenth Circuit cited Judge Murphy's dissent and concluded that the statute places adequate limits on the Secretary's discretion, namely, the requirement that the land be acquired for Indians, the limitation on authorized funds, and the goals identified in the legislative history. 185 F.3d at 1137; *see also Carcieri*, 398 F.3d at 33-34 (adopting the *Roberts* court's reasoning).

We agree with the views expressed by Judge Murphy in her dissent in *South Dakota I*: The scope of the power conferred in § 465 is broad, but – unlike the powers conferred in *Panama Refining* and *Schechter Poultry* – it does not involve granting to the executive authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy. We believe that it is possible to "ascertain whether the will of Congress has

been obeyed" when examining an application of the Secretary's authority under § 465 based upon the guidance in the IRA and its legislative history. *See Yakus*, 321 U.S. at 426, 64 S.Ct. 660.

The language of § 465 itself provides guidance. As Judge Murphy stated:

> It directs that any land acquired must be for Indians as they are defined in 25 U.S.C. § 479. It authorizes the appropriation of a limited amount of funds with which land could be acquired and specifically prohibits use of such funds to acquire land for the Navajo Indians outside of their established reservation boundaries in Arizona and New Mexico.

South Dakota I, 69 F.3d at 887 (Murphy, J., dissenting). The State argues that these claimed textual limitations are artificial because any acquisition could be seen as "for Indians," regardless of who else it harms. Likewise, because most of the land currently taken into trust has been previously purchased by a tribe, the limit on appropriated funds for purchasing land is irrelevant. We disagree that these limitations were meaningless when the IRA was enacted, and we conclude that the context of the entire act and its legislative history continue to give meaning to the phrase "for the purpose of providing land for Indians."

The legislative history of the IRA indicates that "[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe*, 411 U.S. at 152, 93 S.Ct. 1267 (quoting H.R.Rep. No. 1804,

73rd Cong., 2d Sess., at 6 (1934)). Numerous sections in the act itself and in its legislative history indicate that Congress believed that a critical aspect of that broad goal was "to conserve and develop Indian lands and resources." H.R.Rep. No. 1804, 73rd Cong., 2d Sess., at 5 (1934) (the first phrase included in the title of the bill); S.Rep. No. 1080, 73rd Cong., 2d Sess., at 1 (1934) (same). The act includes six sections addressed to land policy. 25 U.S.C. §§ 461-466 (providing means to preserve and increase the amount of Indian lands). Representative Howard, the sponsor of the bill in the House of Representatives, described the tremendous loss of land that resulted from the government's allotment policy, begun in 1887, 78 Cong. Rec. 11,726 (1934), and indicated that the act would help remedy the problem by preventing "any further loss of Indian lands" and permitting "the purchase of additional lands for landless Indians." *Id.* at 11,727; *see also* 78 Cong. Rec. 11,123 (June 12, 1934) (statement of Senator Wheeler, sponsor of the bill in the Senate, echoing the remedial goals in relation to Indian lands).

Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities. S.Rep. No. 1080, at 2 (stating that section 5 would "meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support"); H.R.Rep. No. 1804, at 6 (noting that the purchase of lands would help "[t]o make many of the now pauperized, landless Indians self-supporting"); 78 Cong. Rec. 11,730 (statement of Rep. Howard that section 5 would "provide land for Indians who have no land or insufficient land, and who can use land beneficially"). Although the legislative history frequently mentions landless Indians, we do not believe that

Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians. The House and Senate reports imply that members of Congress believed that that would be the most common application of the statute – giving land to landless Indians would enable them to farm or work in stock grazing or forestry operations – but the statutory language and the expressions of purpose for section 5 in the reports indicate that Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support. *See, e.g.*, S.Rep. No. 1080, at 2; 78 Cong. Rec. 11,732 (statement of Rep. Howard that a long-term goal is "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it").[8]

Accordingly, we conclude that an intelligible principle exists in the statutory phrase "for the purpose of providing land for Indians" when it is viewed in the statutory and historical context of the IRA. The statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to the Department. We therefore affirm the grant of summary judgment for the Department on the nondelegation doctrine challenge.

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[8] We have also previously concluded that the language and legislative history did not limit the application of § 465 to landless Indians. *Chase*, 573 F.2d at 1015-16.

B.

We turn, then, to a review of the Secretary's action approving the taking of the 91 acres into trust. We review the agency action under the APA. 5 U.S.C. §§ 701-706.[9] "When reviewing the district court's opinion upholding the administrative agency's decision, this court must render an independent decision on the basis of the same administrative record as that before the district court." *United States v. Massey*, 380 F.3d 437, 440 (8th Cir.2004). We will set aside the agency action if the Secretary acted in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When we apply an agency regulation, "we accord substantial deference to an agency's interpretation of its own regulation," unless the regulation violates the Constitution or a federal statute, "or unless the interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Coalition for Fair & Equitable Reg.*, 297 F.3d at 778.

As the reviewing court, we engage in a substantial inquiry, based on an examination of the administrative record, in order to answer three questions: (1) whether the Secretary acted within the scope of his authority, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); (2) whether the decision was "based on a consideration of the relevant

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[9] Such review of agency action is appropriate in most circumstances, absent the applicability of two narrow exceptions: where there is a statutory prohibition on review or where agency action is committed to agency discretion by law. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); 5 U.S.C. § 701. Neither of these exceptions applies here.

factors," *Id.* at 416, 91 S.Ct. 814; and (3) whether the Secretary "follow[ed] the necessary procedural requirements." *Id.* at 417, 91 S.Ct. 814. Here, the Secretary acted within the scope of his authority, for, as quoted above, § 465 specifically authorizes the Secretary to take land into trust for Indians. The more relevant questions on review are whether he considered the relevant factors and followed the necessary procedural requirements.

We are to make a searching inquiry into the facts, examining the full administrative record, 5 U.S.C. § 706, but we do not substitute our judgment for that of the agency, *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1031 (8th Cir.2003), even if the evidence would have also supported the opposite conclusion. *Harrod v. Glickman*, 206 F.3d 783, 789 (8th Cir.2000). We ask whether the agency "'articulate[d] a rational connection between the facts found and the choice made.'" *Ubbelohde*, 330 F.3d at 1031 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)); *see also Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (stating that "an agency must cogently explain why it has exercised its discretion in a given manner"). We will not try to identify failures in clarity or detail, *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856, and will reverse "only when there is no rational basis for the policy choice." *Ubbelohde*, 330 F.3d at 1032. In other words, the agency need not exhaustively analyze every factor, but must base its determination "upon factors listed in the appropriate regulations" and must use a "reasonable interpretation of the regulation and the statute" in reaching its conclusion. *Harrod*, 206 F.3d at 788. The burden is on the plaintiff to

prove that the agency's action was arbitrary and capricious. *Massey*, 380 F.3d at 440.

The State challenges the adequacy of the Department's consideration of several of the required factors. In order to meet its burden of proof, however, it must present evidence that the agency did not consider a particular factor; it may not simply point to the end result and argue generally that it is incorrect. The regulations established by the Department to implement the IRA are binding, and they establish the process that the Secretary must follow in deciding whether to take land into trust, 25 C.F.R. §§ 151.10 and 151.11, thereby guiding our inquiry.

For an off-reservation acquisition, described in 25 C.F.R. § 151.11, the Secretary must consider all but one of the factors in 25 C.F.R. § 151.10 (considerations for on-reservation acquisitions) plus three additional considerations. The State claims that the following criteria in § 151.10 were not properly considered:

> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> . . .
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise.

The State also argues that § 151.11(b) was not adequately analyzed. This provision states: (b) The location of

the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. . . .

The record reveals that the Department extensively reviewed the Tribe's application and the objections raised in the State's response. In light of the complex history of the case, the Secretary's final decision was issued by the Assistant Secretary of Indian Affairs rather than by the BIA's Regional Director. The Regional Director had recommended final approval, stating that the Tribe would greatly benefit economically and setting forth a brief review of each of the relevant provisions in 25 C.F.R. §§ 151.10 and 151.11. App. 227-33. The Acting Deputy Commissioner of Indian Affairs noted several deficiencies in the application and asked the Regional Director for a more detailed analysis of several factors. *Id.* at 234-35. The Regional Director submitted another memorandum and reconfirmed her recommendation. *Id.* at 236-39. The Director of the Office of Trust Responsibilities, through the Deputy Commissioner of Indian Affairs, then provided a memorandum in support of the Assistant Secretary's decision to take the land into trust that included a detailed analysis of the factors in the regulations. *Id.* at 242-48.

We conclude that the Secretary reasonably and appropriately evaluated the relevant factors. The agency "articulate[d] a rational connection between the facts found and the choice made," *Ubbelohde*, 330 F.3d at 1031 (quotation omitted), for each of the regulatory provisions, and we do not require precise explanations that respond to every contention. The record supports the conclusion that

the expressed rationale in the Secretary's conclusions was consistent with the facts.

In analyzing the Tribe's need for the additional land, 25 C.F.R. § 151.10(b), the Regional Director expressed her belief that the particular tract of land would greatly enhance the Tribe's economic base and its ability to be self-sufficient, thereby serving the purposes of the IRA. App. 236-37. The memorandum accompanying the final decision also emphasized that the Tribe had great need for additional income and stated that "[t]he location of the land, adjacent to Interstate No. 90, makes it more attractive to business and would enhance the tribes [sic] economic rehabilitation and support self sufficiency." *Id.* at 245. The Tribe asserted that the protections of trust status were essential to facilitate growth in tribal industry and ensure the use of the land for future generations. *Id.* at 192. We agree with the district court that it would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance. *South Dakota III*, 314 F.Supp.2d at 943. It was sufficient for the Department's analysis to express the Tribe's needs and conclude generally that IRA purposes were served. Its conclusion that the Tribe needed the land to be taken into trust was therefore reasonable.

The Tribe made its purpose for the land clear through its business plan and the comprehensive plan for the entire corridor of the Native American Scenic Byway. It expressed its intent to establish a means of attracting heritage tourism to its reservation by building an information center and southern terminal entrance to the Native American Scenic Byway on the 91-acre parcel. App. 82C. The business plan described a display that would include a

"circle of teepees" to represent the seven Sioux tribes located within South Dakota and that would attract visitors to the historical byway. *Id.* It was reasonable for the Secretary to accept the Tribe's representations in his analysis of 25 C.F.R. § 151.10(c). *Id.* at 246. In addition, the Secretary was not required to seek out further evidence of possible gaming purposes in light of the Tribe's repeated assurances that it did not intend to use the land for gaming[10] and the December 15, 1998, letter from then-Governor Janklow that expressed his support for the acquisition and which stated that he had been assured "that the Tribe [would] not conduct gaming" on the land. *Id.* at 204.

Because the Tribe owned the land in unrestricted fee status prior to its application for trust status, the Secretary also evaluated the impact of the loss of taxes on the State in accordance with 25 C.F.R. § 151.10(e). The Secretary found that the county and city would lose $2,587.02 in taxes, and expressed his belief that the amount was insignificant in light of the great benefit to the Tribe.[11] *Id.* at 238, 246-47. The State argues that its potential loss would be much higher if the land, which currently houses no businesses, were developed, and contends that the Secretary should have to consider such potential loss. We

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[10] The Tribe also acknowledged that if it were later to seek to allow gaming on the land, it would fully comply with the additional application and approval requirements in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. App. 197-98.

[11] The Tribe additionally asserted that it expected its plan to increase tourism in the area and therefore believed that the city's businesses would benefit from the increased traffic, offsetting "any loss in property taxes" resulting from the land being taken into trust. App. 241.

disagree, and we adopt the district court's reasoning that it is a reasonable interpretation of the regulation to require consideration of the tax impact only in relation to the manner in which the land was being used at the time of the application. *South Dakota III*, 314 F.Supp.2d at 945.

It was also appropriate for the Secretary to conclude that no serious jurisdictional problems were likely to result from taking the land into trust. The Secretary appropriately considered the availability of law enforcement services, noting that the BIA would provide such services, as it does within the Lower Brule Reservation, and indicating that the Tribe had expressed its intent to pay for any additional services received from the City of Oacoma. App. 238, 247. Moreover, we cannot say that it was inappropriate for the Secretary to take into account the fact that apparently no jurisdictional problems had resulted from the Tribe's acquisition in 1995 of some 3,400 acres of land lying west of the Lower Brule Reservation. *Id.* at 247.

Finally, although the memoranda did not specifically mention 25 C.F.R. § 151.11(b), the provision concerning the location of the acquired land in relation to state and tribal boundaries, we cannot say that the Secretary failed to consider it. The distance between the reservation and the 91 acres is not so great as to make the land's connection to the reservation illogical or to require more exacting scrutiny of the Tribe's intent. As indicated earlier, the property is located some seven to eight miles south of the Tribe's reservation. That distance, considering the circumstances of rural central South Dakota, is of no great significance, and the tract's location in close proximity to Interstate 90, the major east-west route across the state, holds the greatest potential for the accomplishment of the

Tribe's goals. The Secretary acknowledged the distance of the land from the exterior boundaries of the reservation, and his discussion of the location of the property reflected his adequate consideration of § 151.11(b).

Accordingly, we conclude that the Secretary's action was not arbitrary, capricious, or an abuse of discretion, and we affirm the grant of summary judgment in favor of the Department.

III.

In addition to claiming that the Secretary acted arbitrarily, the State also raises a separate claim that the district court erred in not allowing supplementation of the record with evidence that the Tribe's actual intended use for the property is that of conducting gaming operations. We will defer to the district court's conclusion that the administrative record contained sufficient information "absent a gross abuse of discretion." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir.2004). The State argues that the district court could not determine whether the agency properly analyzed the factors without examining the State's proffered additional evidence. "A federal court is confined to the administrative record in deciding an appeal under the APA," *Maxey v. Kadrovach*, 890 F.2d 73, 77 (8th Cir.1989); *see also Newton County Wildlife Assoc. v. Rogers*, 141 F.3d 803, 807 (8th Cir.1998), in order to "preclude[] the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency." *Voyageurs*, 381 F.3d at 766. The very narrow exceptions to this rule "apply only under extraordinary circumstances" in which a strong showing can be made that the record is so incomplete as to preclude effective

judicial review or that there is clear bad faith or improper behavior. *Id.* No such extraordinary circumstances are present here.

The State has failed to show that the Secretary's actions evidenced bad faith sufficient to justify the supplementation. If there is any evidence of bad faith at all, it "falls short of the strong showing of bad faith or improper behavior necessary to permit discovery and supplementation of the administrative record." *Maxey*, 890 F.2d at 77. In his September 25, 1997, letter to the BIA, the Tribal Chairman stated that it was not the Tribe's current intention to use the land for gaming. The letter further stated that if gaming was eventually considered, "our Council has passed a resolution indicating that we would adhere to the provisions of the Indian Gaming Regulatory Act (IGRA)."[12] App. 82. As indicated above, the Tribe's December 1997 business plan for the land more specifically detailed its purposes and intended use for the land. Likewise, in its May 20, 1998, response to the State's objections, the Tribe reasserted its commitment not to use the land for gaming, again noting that IGRA ensured that it could not change its mind without additional state and federal approval. *Id.* at 197.

We conclude that the district court did not err in finding that the Tribe's consistent representations that it did not intend to use the land for gaming constituted

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[12] IGRA establishes that a tribe must meet additional requirements before it may use off-reservation land for gaming purposes. 25 U.S.C. § 2719. Even if the tribe obtained the land in trust for a non-gaming purpose and then changed its mind, it would still have to comply with the requirements detailed in IGRA before it could do so. *Id.; see also* 64 Fed.Reg. 17,578 (Apr. 12, 1999).

sufficient evidence to support the Secretary's conclusion in that regard and that there was thus no need to supplement the record.

The judgment is affirmed.

314 F.Supp.2d 935

United States District Court, D. South Dakota,
Central Division.
State of SOUTH DAKOTA, City of Oacoma,
and Lyman County, Plaintiffs,
v.
UNITED STATES DEPARTMENT OF the
INTERIOR; Aurene Martin, Acting Assistant
Secretary-Indian Affairs; Bill Benjamin, Acting
Regional Director, Great Plains Regional Office, BIA;
and Cleve Her Many Horses, Superintendent,
Lower Brule Agency, BIA, Defendants.
No. CIV. 00-3026-RHB.

April 19, 2004.

John Pl. [sic] Guhin, Pierre, SD, Paul E. Jensen, Oacoma/Lyman Co., Winner, SD, for Plaintiff.

Cheryl Schrempp Dupris, Pierre, SD, Judith Rabinowitz, Juneau, AK, for Defendant.

MEMORANDUM OPINION AND ORDER

BATTEY, District Judge.

The state of South Dakota, city of Oacoma, and Lyman County ("plaintiffs"), filed suit in this Court seeking declaratory and injunctive relief to prevent the defendants ("Interior") from taking a 91-acre parcel of land ("Oacoma parcel") into trust for the Lower Brule Sioux Tribe ("the Tribe") pursuant to Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465. Plaintiffs claim that the unfettered authority bestowed upon the Secretary of the United States Department of the Interior ("Secretary" or "Agency") via 25 U.S.C. § 465 equates to an unconstitutional delegation of legislative authority to the executive

branch. In the alternative, plaintiffs contend that the decision to take the Oacoma parcel into trust was arbitrary and capricious because the Agency failed to consider the requisite factors as listed in 25 C.F.R. pt. 151.

Interior argues that 25 U.S.C. § 465 is constitutional because the text and underlying policy of the statute establish sufficient boundaries on the Secretary's discretion and intelligible principles for courts to consider when reviewing a decision by the Secretary under Section 5. Interior also maintains that the decision was a reasonable one made after considering all relevant factors. Accordingly, Interior asks the Court to declare § 465 constitutional and affirm the Agency's decision to take the Oacoma land into trust.

PROCEDURAL HISTORY

In 1990, the Tribe filed an application with the Secretary to have the Oacoma parcel taken into trust pursuant to 25 U.S.C. § 465. The Tribe's application was subsequently approved. The state of South Dakota and city of Oacoma appealed the decision to the Interior Board of Indian Appeals; however, the appeals board dismissed the appeal claiming it lacked jurisdiction to review decisions of the Assistant Secretary – Indian Affairs. On November 30, 1992, the Oacoma parcel was transferred into trust for the Tribe.

After the adverse decision by the Interior Board of Indian Appeals, the state and city filed suit in this Court requesting review of the Agency's decision. This Court determined that it was without jurisdiction to review the decision for the reason that the Quiet Title Act, 28 U.S.C. § 2409a, forbids suits under the Administrative Procedures

Act, 5 U.S.C. § 706, when plaintiffs, who do not claim a property interest in land, seek review of a decision of the Secretary to take land into trust for Indians pursuant to 25 U.S.C. § 465. *South Dakota v. United States Dep't of the Interior,* CIV. 92-3023 (D.S.D.1994). This Court also concluded that 25 U.S.C. § 465 was not an unconstitutional delegation of legislative power to the executive branch. The state and city then appealed that decision to the Eighth Circuit Court of Appeals. The Eighth Circuit panel, in a plurality opinion with Judge Diana Murphy writing a dissenting opinion, determined that 25 U.S.C. § 465 equated to an unconstitutional delegation of legislative power and reversed this Court's decision. *South Dakota v. United States Dep't of the Interior,* 69 F.3d 878 (8th Cir.1995) (*"Oacoma I"*). Interior then filed a petition for a writ of certiorari with the United States Supreme Court. The Supreme Court granted Interior's writ, vacated the decision of the Eighth Circuit, and remanded the matter back to the Secretary in light of Interior's enactment of regulations specifically permitting judicial review of agency decisions that take land into trust for Indians. *United States Dep't of Interior v. South Dakota,* 519 U.S. 919, 117 S.Ct. 286, 136 L.Ed.2d 205 (1996); *see* 25 C.F.R. § 151.12(b) (stating that title will not transfer for 30 days when the Secretary decides to take land into trust). On December 18, 1996, the Eighth Circuit recalled its mandate, vacated its earlier judgment, and remanded the matter to this Court. *South Dakota v. United States Dep't of the Interior,* 106 F.3d 247 (8th Cir.1996). On December 24, 1996, this Court, complying with the Circuit Court's order, remanded the matter to the Agency for reconsideration of its decision. Accordingly, the Oacoma parcel was removed from trust status effective December 24, 1996.

FACTS

On September 9, 1997, the Tribe issued Resolution 97-408 requesting that Interior take the Oacoma parcel into trust. Administrative Record ("AR") 17. A copy of the resolution was forwarded to the Office of the Solicitor in Washington, D.C., however, a letter by Interior indicated the Tribe needed to complete an amended resolution setting forth the purposes for which the land will be used. AR 20. A supplemental resolution was issued on September 25, 1997, stating that the Oacoma land will be used "to enhance the economic development of the tribe, and to provide a nexus to the Oacoma area which is of historical importance to the tribe." AR 29.

On February 12, 1998, the acting superintendent of the Bureau of Indian Affairs ("BIA"), Lower Brule Agency, sent letters to plaintiffs notifying them that the Tribe submitted an application to have the Oacoma parcel placed in trust and solicited comments from plaintiffs on the application. AR 311-21. On March 13, 1998, the state issued a letter in opposition to the Tribe's application. AR 326-618. The city and county submitted a similar letter on that same date. AR 619-744. The Tribe then issued a letter to the acting superintendent in response to plaintiffs' letters. AR 774-822.

On June 30, 1999, the regional director of the Great Plains Regional Office of the BIA Office of Trust Responsibilities, recommended that the acting secretary place the Oacoma parcel in trust status. AR 837. Upon review, however, the regional director noted that there were numerous deficiencies in the Tribe's application. AR 930-44. To this end, the BIA informed the regional director that additional information and further elaboration on

various factors was needed before the BIA could process the Tribe's application. AR 1259-60. On February 18, 2000, the regional director issued a memorandum decision purporting to comply with the BIA's request for additional analysis of the Tribe's application. AR 1271-74. The regional director also recommended the deputy commissioner of indian affairs grant trust status to the Oacoma parcel. *Id.* Finally, after requesting and receiving additional information relevant to the application, the BIA issued a memorandum substantively addressing the 25 C.F.R. pt. 151 factors that the Secretary is required to evaluate when considering whether an application for fee-to-trust status should be granted. AR 1391-97. In concurrence, the deputy commissioner determined that title to the Oacoma parcel should be transferred to the United States in trust for the Tribe. AR 1397. On May 18, 2000, Interior published in the Federal Register notice of its intent to transfer the Oacoma parcel into trust for the Tribe. AR 1409-10; *see* 65 Fed.Reg. 31,594 (Dep't of the Interior May 18, 2000).

On June 16, 2000, plaintiffs filed suit against Interior, requesting declaratory and injunctive relief to prevent transfer of the property into trust for the Tribe. AR 1421-44. After litigation commenced, this Court stayed the matter pending completion of an environmental assessment. On December 14, 2000, in accordance with the environmental assessment, the deputy commissioner issued a finding of no significant impact ("FONSI"). AR 1484. A Notice of Availability was then posted at the Tribe's office and published in *The Chamberlain-Oacoma Register* weekly newspaper. AR 1551, 1553. On January 18, 2001, the deputy assistant secretary ratified its earlier decision to include information on the environmental

assessment and FONSI. AR 1559. The notice of ratification decision was published in the Federal Register on January 26, 2001. AR 1566-67.

On March 19, 2001, plaintiffs submitted an amended complaint. Then, on July 23, 2001, the Tribe filed a motion to intervene in this matter. This Court denied the Tribe's motion to intervene. The Tribe appealed that Order and the denial of intervention was affirmed by the Eighth Circuit Court of Appeals. *South Dakota v. United States Dep't of the Interior,* 317 F.3d 783 (8th Cir.2003). Plaintiffs filed a motion for summary judgment on June 16, 2003. Interior filed a cross-motion for summary judgment on December 15, 2003. On January, 21, 2004, the Tribe filed a brief of amicus curiae in support of Interior's motion for summary judgment.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to a judgment as a matter of law." In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or

other evidence must set forth specific facts showing that a genuine issue of material fact exists. *See* Fed.R.Civ.P. 56(e); *Matsushita,* 475 U.S. at 586-87, 106 S.Ct. at 1356.

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The Supreme Court has instructed that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986) (citations omitted). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita,* 475 U.S. at 586-87, 106 S.Ct. at 1356 (citation omitted).

The teaching of *Matsushita* was further articulated by the Supreme Court in *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 468, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992), where the Court said, "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." The Court expounded on this notion by reiterating its conclusion in *Anderson* that, "[s]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Eastman Kodak,* 504 U.S. at 468 n. 14,

112 S.Ct. at 2083 n. 14 (quoting *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510). To survive summary judgment the evidence must reasonably tend to prove the plaintiff's theory. *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 768, 104 S.Ct. 1464, 1473, 79 L.Ed.2d 775 (1984).

DISCUSSION

Plaintiffs have raised two issues for review by the Court: (1) whether the decision to grant trust status was arbitrary and capricious; and (2) whether Section 5 of the IRA, 25 U.S.C. § 465, is an unconstitutional delegation of legislative authority. Interior disputes plaintiffs' claims. The Court treats the claims in plaintiffs' amended complaint that were not addressed in the summary judgment briefs as conceded.

ARBITRARY AND CAPRICIOUS

This Court reviews agency action under the Administrative Procedures Act to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994). When determining whether an agency's decision is arbitrary and capricious the Eighth Circuit has stated:

> [T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

South Dakota v. Ubbelohde, 330 F.3d 1014, 1031 (8th Cir.2003) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971), *overruled on unrelated grounds by Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977)). In order for the agency's decision to pass scrutiny it must explain a rational connection between the choice made and the facts found. *Id.* (citations omitted). "[A] court may find an action to be arbitrary and capricious only when there is no rational basis for the policy choice." *Id.* at 1032.

25 C.F.R. § 151.1 "set[s] forth the authorities, policy, and procedure governing the acquisition of land by the United States in trust status for individual Indians and tribes." The relevant section of these regulations is 25 C.F.R. § 151.11, which deals with off-reservation acquisitions of land. Section 151.11 sets forth the criteria the Secretary must consider when determining whether a request for the acquisition of land in trust should be granted. It also expressly incorporates for consideration several of the criteria listed in § 151.10. *See* 25 C.F.R. § 151.11(a) (indicating that the criteria listed in § 151.10(a) through (c) and (e) through (h) shall also be considered by the Secretary).

Plaintiffs object to the Agency's decision to grant that Tribe's application for a variety of reasons. These objections include: (1) the analysis of the criteria listed in 25 C.F.R. §§ 151.10 and 151.11 was flawed because it failed to address relevant evidence and failed to explain how the facts found supported the choice made, (Pls.' Br. Supp. Summ. J. at 34); (2) the decision failed to discuss § 151.3(A)(3), which in this case specifically pertains to the finding that acquisition of the land will facilitate economic

development of the Tribe, *Id.* at 53; (3) the decision was a clear error in judgment, *Id.* at 54; (4) the decision failed to adhere to the process which was promised to the Supreme Court, *Id.* at 55; (5) the construction of the Circle of Tipis obviates the need to place the land in trust status, *Id.* at 60; and (6) there is no evidence supporting the decision to place in trust status the acreage in excess of the nine acres on which the Circle of Tipis sits, *Id.* Interior contends the Agency's decision was reasonable and is supported by both the memorandum decision and the Administrative Record. (Defs.' Mem. Opp. Summ. J. at 1-24.)

25 C.F.R. § 151.10(b)

Subsection 151.10(b) states that the Secretary shall consider "[t]he need of the individual Indian or the tribe for additional land." The Secretary indicated that the Tribe needed the Oacoma parcel "to diversify the tribe's economic development, expand their [sic] trust land base, and to generate much needed income for the Lower Brule Sioux Tribe for use in providing services to tribal members." AR 1394. The Secretary further said that the land currently encompassed by the Lower Brule Sioux Indian Reservation: (1) is diminished in size from what it once was; (2) includes approximately 27,137 acres of wasteland; and (3) includes approximately 40,000 acres of land owned by non-Indians. *Id.* The Secretary also noted that the Oacoma parcel is "more attractive to business[es] and would enhance the tribe[']s economic rehabilitation and support self-sufficiency." *Id.* Plaintiffs argue, however, that the analysis of this criterion was incomplete because the Secretary failed to discuss why the Tribe needs to hold the Oacoma parcel in *trust*.

Plaintiffs assert that "25 C.F.R. § 151.10(b) demands that the 'Governing Decision' consider the 'need of the tribe for additional land' to be in trust." (Pls.' Br. Supp. Summ. J. at 39.) They further claim that the Tribe already owns the land in fee and that form of ownership is sufficient for the purposes in which they plan to use the land. (Pls.' Br. Supp. Summ. J. at 39.) In reading § 151.10(b), however, there is no mention of the word "trust," nor is there any indication that the Secretary must evaluate an applicant's request in such a manner.

Plaintiffs are essentially arguing that the Secretary's decision should be reversed because it fails to discuss the benefits of holding land in trust, as opposed to fee, status. The IRA, which authorizes the United States to acquire land in trust for Indians, was enacted for the very reasons plaintiffs want explained. Most notably, it was enacted "to safeguard Indian lands against alienation from Indian ownership and against physical deterioration." H.R. 7902, 73rd Cong., tit. III, § 1 (1934); *see also Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.1978) (stating the purpose of the IRA is to rehabilitate the Indian's economic viability and halt the loss of their lands that occurred as a result of an inability to manage allotted land). Plaintiffs expansive reading of § 151.10(b) is unpersuasive. Regulation § 151.10(b) requires that the Secretary must merely explain why the Tribe needs the additional land. As indicated above, and as evidenced in the Secretary's decision, the Secretary listed several reasons why the Tribe needs the Oacoma parcel. To require the Secretary to discuss the history and purpose of the IRA each time the United States is requested to take land into trust for an individual Indian or tribe is not required and would be unnecessary. Thus, the memorandum decision satisfactorily

indicates that the Secretary reasonably considered the criterion listed in § 151.10(b). There is a rational basis for this decision.

25 C.F.R. § 151.10(c)

Subsection 151.10(c) states that the Secretary shall consider "[t]he purposes for which the land will be used." The Secretary stated that the land was originally scheduled to promote economic development through the construction of an industrial park. AR 1395. The Tribe has since proposed that the land will be used as a Native American Scenic Byway ("Byway"). *Id.* The opinion also notes that the Tribe submitted a business plan for the Byway project and that the Tribe is awaiting federal funding. *Id.* Plaintiffs argue that the Secretary's discussion of subsection (c) is deficient because it did not address contentions submitted by plaintiffs and because "it did not consider the high probability that the tribe plans to use the land for gambling." (Pls.' Br. Supp. Summ. J. at 44-47.)

On December 15, 1998, the Honorable William Janklow, then Governor of the State of South Dakota, sent a letter to the Secretary stating that he supports the Tribe's new business plan in light of its assurances that it would not conduct gaming on the Oacoma parcel. AR 827. The Secretary made note of this letter in the memorandum decision (AR 1395), however, plaintiffs claim this "glancing allusion" is insufficient for purposes of determining whether "the *agency* has found that gambling is an intended use." (Pls.' Br. Supp. Summ. J. at 45-47.) In support of this contention, plaintiffs reference several statements by Tribe Chairman Michael Jandreau that indicate gaming on the Oacoma parcel is a consideration. *Id.*

Although a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given," the court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Mausolf v. Babbitt,* 125 F.3d 661, 667 (8th Cir.1997) (citation omitted). Additionally, "[i]f the administrative record contains evidence that supports the positions of both the agency and the party seeking relief, the agency is entitled to rely on its experts' tests and observations, and decisions made in such reliance are not arbitrary and capricious." *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the United States Dep't of Agric.,* 266 F.3d 889, 899 (8th Cir.2001) (citation omitted). The Secretary addressed the purposes for which the Tribe intends to use the Oacoma parcel. The Secretary also noted that the letter from Governor Janklow indicated the Tribe assured him that they would not conduct gaming on the land. It appears to this Court that what the Secretary is indicating is that it does not consider gaming to be a purpose for which the land will be used. Furthermore, even though there is evidence in the record that indicates the Tribe considered conducting gaming on the Oacoma parcel, it does not overshadow the purposes expressly set forth in the Tribe's business plan. *See Carcieri v. Norton,* 290 F.Supp.2d 167, 178 (D.R.I.2003) (affirming agency's decision to take land into trust even though there was evidence in the record that indicated the land might be used for gambling purposes); *see also City of Lincoln City v. United States Dep't of Interior,* 229 F.Supp.2d 1109, 1124 (D.Or.2002) (stating that the Secretary "does not have the authority to impose restrictions on a Tribe's future use of property taken into trust, or to acquire fee-to-trust property conditionally").

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, permits gaming on lands acquired in trust if the Secretary, and the governor of the state where the gaming is to take place, determine that it "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(a). Plaintiffs draw attention to the possibility the Tribe may conduct gaming on the Oacoma parcel by referencing the statements of Chairman Jandreau and Governor Janklow. The possibility the Tribe may conduct gaming on the Oacoma parcel, however, is irrelevant to the present discussion concerning the Secretary's decision to take the land into trust. Although gaming on the Oacoma parcel may develop into a cognizable issue between the parties, it is a matter that must be addressed on another day. *See* 25 U.S.C. § 2719(c) (stating that "[n]othing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust"). It should be noted, however, that this Memorandum Opinion is not to be construed as endorsing or permitting gaming on the Oacoma parcel. Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.10(c). There is a rational basis for this decision.

25 C.F.R. § 151.10(e)

Subsection 151.10(e) states that "[i]f the land to be acquired is in unrestricted fee status, [the Secretary shall consider] the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." The Secretary noted that the Oacoma parcel generates $2,587.02 in tax revenue for plaintiffs. AR 1396. The Secretary determined that the loss of such revenues would

not have a significant impact on the local governments. *Id.* Plaintiffs argue that this analysis is insufficient because the decision failed to take into account plaintiffs' proposed losses to the local governments if a truck stop or residential properties were to occupy the land. (Pls.' Br. Supp. Summ. J. at 47-48.) Again, this Court finds such argument immaterial to the Secretary's decision.

Plaintiffs submitted to the Secretary an analysis of the tax losses if there were businesses on the Oacoma parcel. In the memorandum decision, however, the Secretary reported that there are no businesses on the Oacoma parcel. Plaintiffs' assertion that the memorandum decision was arbitrary and capricious because it did not include the projected tax losses if hypothetical businesses were later constructed on the Oacoma parcel is without merit. A reasonable interpretation of section 151.10(e) is that the Secretary must consider the impact of removing the land from the tax rolls at the time the application is filed. It would be illogical to require the Secretary to speculate as to every possible economic use for land that an applicant is requesting the Secretary place in trust. *See Lincoln City,* 229 F.Supp.2d at 1125 (stating that the BIA need not speculate about revenues from potential ventures). Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.10(e). There is a rational basis for this decision.

25 C.F.R. § 151.10(f)

Subsection 151.10(f) states that the Secretary shall consider the "[j]urisdictional problems and potential conflicts of land use which may arise." In the memorandum decision, the Secretary noted that the Tribe did not

expect any problems or conflicts with the use of the Oacoma parcel. AR 1396. In support of this conclusion the Secretary referenced an earlier land acquisition that was west of the Lower Brule Reservation which did not cause any problems. *Id.* The memorandum also indicates the BIA will supply law enforcement for the Oacoma parcel. *Id.* Plaintiffs claim the memorandum decision is arbitrary and capricious because it "entirely ignored" the information they provided regarding jurisdictional problems. (Pls.' Br. Supp. Summ. J. at 48.)

"The regulations only require that the BIA undertake an evaluation of potential problems." *Lincoln City,* 229 F.Supp.2d at 1124. The Secretary considered the fact that minimal problems were created by a previous acquisition of off-reservation property and that the Tribe did not expect any problems with the acquisition of the Oacoma parcel. AR 1396. Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.10(f). There is a rational basis for this decision.

25 C.F.R. § 151.10(g)

Subsection 151.10(g) states that "[i]f land to be acquired is in fee status, [the Secretary shall consider] whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." The Secretary determined that the BIA will be staffed and equipped to administer the Oacoma property. AR 1396. This includes assisting in all real estate functions. *Id.* The Secretary also noted that the Great Plains Regional Office will provide technical support to the Tribe. *Id.* Plaintiffs again contend

that because the memorandum decision did not included an exhaustive analysis of the benefits and drawbacks of placing the land in trust, the Secretary did not consider the negative effects, and hence, the decision is arbitrary and capricious. (Pls.' Br. Supp. Summ. J. at 50-51.)

The Secretary is only required to consider whether the BIA is equipped to handle the additional duties that will arise if the property is taken into trust. The Secretary considered these factors and determined the BIA will be able to handle these additional duties. Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.10(g). There is a rational basis for this decision.

25 C.F.R. § 151.11(b)

Subsection 151.11(b) states:

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

The memorandum decision indicates that the considerations set forth in subsection (b) were addressed previously in the decision. AR 1397. The decision reports that the Oacoma parcel is not located within the boundaries of the reservation, but is "approximately eight miles south of the current Lower Brule Sioux Indian Reservation." AR

1392. Plaintiffs argue that because the Secretary did not mention the standard set forth in paragraph (b), the decision to grant the Oacoma parcel trust status is arbitrary and capricious. (Pls.' Br. Supp. Summ. J. at 52-53.)

The memorandum decision establishes that the Oacoma parcel will help the Tribe better develop its economy because it is located on the interstate and more attractive to businesses. AR 1394. Plaintiffs have submitted no information negating the Secretary's finding on this issue. Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.11(b). There is a rational basis for this decision.

25 C.F.R. § 151.3(a)(3)

Subsection 151.3(a)(3) states that land may be acquired in trust status for a tribe "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." The Secretary determined that the Byway will advance the economic growth of the Tribe. AR 1393-94. Plaintiffs argue that the decision is arbitrary and capricious because it does not analyze the economic growth of the Oacoma parcel if held in trust status versus fee status. (Pls.' Br. Supp. Summ. J. at 53-54.)

The regulation merely requires the Secretary to "consider" whether the acquisition is "necessary." Plaintiffs argue that the decision is deficient because it fails to explain why holding the land in trust is more beneficial than holding it in fee. However, the Court has determined that the Secretary is not required to delve into an in-depth discussion of the purposes behind enactment of the IRA

each time an application to acquire land in trust status is considered. Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.3(a)(3). There is a rational basis for this decision.

Clear Error In Judgment

Subsection 151.11(c) states that "[w]here land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." Plaintiffs claim the Secretary's decision is arbitrary and capricious because it amounts to a clear error of judgment. (Pls.' Br. Supp. Summ. J. at 54-55.) In support of this contention plaintiffs argue the business plan submitted by the Tribe is inadequate because it does not include a cost-benefit analysis. Plaintiffs also point out that the plan could not provide the agency any guidance because the Secretary noted the plan was "strictly speculative."

The Tribe issued a detailed business plan setting forth the intricacies of the Byway. AR 127-296. The plan also includes projections on attendance and the economic impact the Byway will have on the community. AR 289. The decision reported that the Tribe's plan was speculative, however, because the plan was created under the premise the project would receive federal funding from an agency which may or may not provide funding. AR 1397. Plaintiffs claim this amounts to a clear error of judgment. The Court disagrees. Although the plan may not be as complete as plaintiffs would like, that is not the standard by which a court reviews agency action. The plan stated the anticipated economic benefits in conjunction with

creation of the Byway. Thus, the memorandum decision satisfactorily indicates that the Secretary reasonably considered the criterion listed in § 151.11(c). There is a rational basis for this decision.

Broken Promises

Plaintiffs also contend the decision should be reversed because Interior did not adhere to the representations it made to the Supreme Court. (Pls.' Br. Supp. Summ. J. at 55-60.) Specifically, plaintiffs claim they were denied due process because Interior denied them a "full and fair hearing of its claims." *Id.* at 58. Review of Interior's petition for writ of certiorari reveals that Interior's arguments for remand were based on changes to the regulations which now provide for judicial review of Agency decisions as they pertain to acquisitions of land in trust. However, at no place in Interior's submissions to the Supreme Court is it indicated that plaintiffs will be provided a "hearing." The regulations were amended to supply state and local governments notice and an opportunity "to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." Land Acquisitions, 61 Fed.Reg. 18,082 (Dep't of the Interior April 24, 1996) (to be codified at 25 C.F.R. § 151.12(b)). The Secretary provided plaintiffs notice and an opportunity to submit comments on the acquisition, which they did. Thus, having found that Interior complied with the regulations and adhered to its assertions to the Supreme Court, plaintiffs' argument is dismissed as being without merit.

Plaintiffs remaining arguments essentially reiterate that which they advanced throughout their briefs in

support of, and in opposition to, summary judgment. Plaintiffs contend the decision is deficient in that it fails to explain why the acreage on which the Circle of Tipis sits, and the remaining acreage, needs to be placed in trust for the Tribe. (Pls.' Br. Supp. Summ. J. at 60-61.) Having already explained why the Secretary need not explain the benefits of holding land in trust versus fee status, plaintiffs' arguments are dismissed as being without merit.

Finally, with regard to Interior's motion for summary judgment, it is contended that the Secretary's decision satisfactorily addressed all relevant criteria as listed in 25 C.F.R. pt. 151. (Def's Mem. Supp. Summ. J. at 15-30.) Plaintiffs do not rebut this contention with regard to 25 C.F.R. §§ 151.10(a), (h), and 151.11(d). Furthermore, review of these uncontested criteria indicates they were sufficiently considered by the Secretary, and a rational conclusion was reached.

CONSTITUTIONALITY OF 25 U.S.C. § 465

A more expansive view of the substantive history of this matter may reveal the peculiar nature of the issue the parties contest. This Court addressed the constitutionality of 25 U.S.C. § 465 when the issue was raised by the state of South Dakota and city of Oacoma over ten years ago. *South Dakota,* CIV. 92-3023 at 19-21. The Court explained that the policy behind Congress's enactment of the IRA was "to acquire land for Indians to help reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more self-sufficient, both economically and otherwise." *Id.* at 21. Thus, the Court determined that the general policy and boundaries set forth were sufficient to guide the Secretary in executing the

authority that Congress had delegated. As a result, this Court held that § 465 was constitutional.

On appeal, the Eighth Circuit reversed that decision. Writing for the majority, Circuit Judge (now Chief Judge) Loken, stated that "[t]here are no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be 'for Indians.'" *Oacoma I,* 69 F.3d at 882. The panel majority remarked that the Secretary's "actions under § 465 may not be judicially reviewed because the statute commits them entirely to agency discretion." *Id.* at 881-82. The court said that this factor necessitated closer scrutiny of plaintiffs' contentions. *Id.* at 883. The court also remarked that "[t]he legislative history of § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.'" *Id.* The panel majority maintained:

> Those who drafted § 465 failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power. The result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles.

Id. at 884-85.

Dissenting from the majority, Circuit Judge Murphy remarked that "the Supreme Court has consistently upheld statutes involving broad delegations of authority."

Id. at 886 (Murphy, J., dissenting). She further remarked that the delegation doctrine has "evolved into a tool of statutory construction, by which reviewing courts give 'narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'" *Id.* (quoting *Mistretta v. United States,* 488 U.S. 361, 373 n. 7, 109 S.Ct. 647, 655 n. 7, 102 L.Ed.2d 714 (1989)). Finally, with reference to the majority's concern that § 465 could conceivably permit the Secretary "to provide a lake home for a politically faithful tribal officer," Judge Murphy held that those fears were insufficient to "strike down an act of Congress." *Id.* at 889.

After this adverse decision, Interior amended § 151.12(b) to provide individuals such as plaintiffs with notice of administrative decisions to acquire land in trust pursuant to the IRA. *See Land Acquisitions,* 61 Fed.Reg. 18,082 (providing for a 30-day waiting period to allow for judicial review of decision). Interior then filed a writ of certiorari with the United States Supreme Court requesting that the matter be remanded to the Secretary in light of its provision of notice and time in which parties may obtain judicial review in such matters. Pet. for Cert. 15. The Supreme Court granted the writ, vacated the decision of the Eighth Circuit, and ordered that the case be remanded to the Secretary to reconsider his administrative decision. *Interior,* 519 U.S. at 919-20, 117 S.Ct. at 286. Accordingly, after traversing various procedural hurdles at the administrative level, the issue of whether § 465 is an unconstitutional delegation of legislative power is again before this Court.

Delegation of Power

Plaintiffs argue § 465 amounts to an unconstitutional delegation of legislative power because a plain reading of the statute fails to delineate its "general policy." They also assert that the legislative history of § 465 cannot be referenced when attempting to discern Congress's "general policy" because it does not equate to a "legislative act." Plaintiffs further contend that the statute is deficient in that it fails to set "boundaries" on the Secretary's authority. Consequently, in order to resolves [sic] these issues, the Court must rely on the rules of statutory construction and interpret the text and history of § 465 accordingly.

Plaintiffs' request of the Court to declare § 465 unconstitutional is a grave and delicate duty. *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 107, 72 L.Ed. 206 (1928) (Holmes, J., concurring) (stating that "to declare an Act of Congress unconstitutional, . . . is the gravest and most delicate duty that this Court is called on to perform"). "The cardinal principle of statutory construction is to save and not to destroy." *United States v. Menasche,* 348 U.S. 528, 538, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) (citation omitted). Acts of Congress are presumed to be constitutional. *Rust v. Sullivan,* 500 U.S. 173, 191, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991) (citation omitted). Finally, "ambiguous statutes passed for the benefit of Indian tribes are to be interpreted in a light most favorable to Indians." *Chase,* 573 F.2d at 1016 (citations omitted).

The United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. With this in mind, the Supreme Court has consistently held "Congress generally cannot delegate its legislative

power to another Branch." *Mistretta,* 488 U.S. at 372, 109 S.Ct. at 654 (citing *Field v. Clark,* 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892)). This principle, however, is not designed to "prevent Congress from obtaining the assistance of its coordinate branches." *Id.* Thus, when Congress does delegate decision-making authority to an agency it "must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Amn. Trucking Ass'ns, Inc.,* 531 U.S. 457, 472, 121 S.Ct. 903, 912, 149 L.Ed.2d 1 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)). The "intelligible principle" test is "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta,* 488 U.S. at 372-73, 109 S.Ct. at 655 (quoting *Amn. Power & Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946)).

General Policy

Plaintiffs concede that § 465 sufficiently identifies the agency that is to apply it. (Pls.' Br. Supp. Summ. J. at 23.) Therefore, the only issues are whether the statute sets forth its "general policy" and the "boundaries" of the Secretary's delegated authority. Section 5 of the IRA, 25 U.S.C. § 465, provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments,

> whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. § 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

A plain reading of § 465 reveals that it was enacted "for the purpose of providing land for Indians." Although the statute uses "purpose," instead of "general policy," to describe its intention, the Court finds that such alleged discrepancy does not invalidate the statute. Furthermore, upon review of the historic context and legislative history of the IRA, Congress's "general policy" supporting enactment of § 465 becomes apparent. *See Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 1002, 108 L.Ed.2d

132 (1990) (stating that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy") (citations omitted); *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 675 F.2d 367, 376 n. 12 (D.C.Cir.1982) (relying on legislative history and philosophy of Act to find that it did not amount to an unconstitutional delegation of legislative power).

Prior to enactment of the IRA, Congress attempted to assimilate Indians into the country's mainstream through an allotment policy. General Allotment Act of Feb. 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq. (1976 ed.) (§§ 331-33 repealed 2000). The policy of the General Allotment Act was simple: "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 254, 112 S.Ct. 683, 686, 116 L.Ed.2d 687 (1992). This policy was a failure, which resulted in a loss of more than 90 million acres of Indian land. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408, 436 n. 1, 109 S.Ct. 2994, 3011 n. 1, 106 L.Ed.2d 343 (1989). As a result, Congress enacted the IRA in an "attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." Felix S. Cohen, *Handbook of Federal Indian Law* 147 (1982 ed.). It was also stated that the IRA was designed "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)).

In order to stem the staggering flow of land from Indian to non-Indian hands, the IRA set forth that "no land of any Indian reservation . . . shall be allotted in severalty to any Indian." 25 U.S.C. § 461. Congress also tried to replenish Indian lands by permitting the Secretary of the Interior to acquire land in trust for Indians, noting that land held in trust is exempt from local and state taxation. 25 U.S.C. § 465.

In repudiating the function of the General Allotment Act, the legislative history of the IRA states that its policy is "[t]o conserve and develop Indian lands and resources." S. 3645, 73d Cong., 2d Sess., 1 (1934). Plaintiffs contend that this policy is unconstitutional because it does not leave room "for a narrowing interpretation of 25 U.S.C. § 465 so as to avoid the overbroad delegation of the plain text of the act." (Pls.' Br. Supp. Summ. J. at 31.) Although this policy is not as specific as the policies listed in a prior version of the IRA, that fact alone does not render the subsequent policy statement invalid. *See* H.R. 7902, 73d Cong., 2d Sess., tit. III, § 1 (setting forth numerous policies of the IRA). Thus, upon review of the text of § 465 and the legislative history quoted above, it is the opinion of this Court that Congress has clearly delineated the general policy behind § 465.

Boundaries

Plaintiffs contend § 465 does not establish any "boundaries" on the Secretary's authority to take land into trust for Indians. A plain reading of the text of the statute, however, reveals that there are boundaries on the Secretary's authority. Moreover, when the text is read in conjunction with the overriding policy of the IRA, these

boundaries are further defined. Finally, the recent decision in *Whitman* conclusively sets forth the Supreme Court's position on the delegation doctrine and effectively closes the door on plaintiffs' constitutional challenge.

Taken in its broadest terms, § 465 authorizes the Secretary to "acquire land in trust for Indians." However, when that generality is read together with all of § 465, as well as the other sections of the IRA and its history, limits on the Secretary's authority are revealed. First, the preceding analysis on the general policy of § 465 establishes that it was enacted "[t]o conserve and develop Indian lands and resources." S. 3645, 73d Cong., 2d Sess., 1 (1934). Thus, it can fairly be said that the acquisition of land for Indians furthers this stated policy. *See Roseville v. Norton*, 219 F.Supp.2d 130, 156 (D.D.C.2002) (stating that the Auburn Indian Restoration Act's policy to advance the Tribe's economic development is a limiting factor in delegation doctrine analysis). Second, the Secretary may only provide land for Indians. *See* 25 U.S.C. § 479 (defining who qualifies as an "Indian"). Third, the Secretary is limited in the amount of funds that can be appropriated to acquire such land. 25 U.S.C. § 465 (setting forth a limit of $2,000,000). Fourth, § 465 prohibits the Secretary from using any of these funds to acquire land outside the Navajo Indian Reservations in Arizona and New Mexico. Solely considering these factors, it is the opinion of this Court that these limitations satisfy the "boundaries" portion of the "intelligible principle" test as it was recently explained in *Mistretta*.

The Eighth Circuit panel opinion held that § 465 was unconstitutional because it felt that the Secretary "had unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual

Indians." *Oacoma I,* 69 F.3d at 882. This decision was made, however, before the Supreme Court issued its opinion in *Whitman.* The pertinent issue raised in *Whitman* was whether section 109(b)(1) of the Clean Air Act, as added, 84 Stat. 1679, and amended, 42 U.S.C. § 7409(a), is an unconstitutional delegation of legislative power to the Administrator of the Environmental Protection Agency. *Whitman,* 531 U.S. at 462, 121 S.Ct. at 907. It is the ensuing analysis in *Whitman* that sets forth the Supreme Court's definition of the "intelligible principle" test and clarifies the constitutional issue before this Court.

Section 109(b)(1) gives the Administrator the authority to set air quality standards that "are requisite to protect the public health." The relevant part of that statute in issue in *Whitman* were the words "requisite" and "public health." *Id.* at 472-76, 121 S.Ct. at 911-14. The parties contesting § 109(b)(1) argued that these words were susceptible to various interpretations and indefinite. *Id.* at 465-66, 468-69, 121 S.Ct. at 908-09, 910. The Supreme Court held, however, that the language in § 109(b)(1) was "well within the outer limits of our nondelegation precedents." *Id.* at 474, 121 S.Ct. at 913.

In explaining its holding in *Whitman,* the Supreme Court noted that it has only found a statute lacking of an intelligible principle in two situations. *Id.* (citing *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)). The Supreme Court further noted that it "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-75, 121 S.Ct. at 913 (citation omitted). Also, the Supreme Court

held that it has "never demanded, . . . that statutes provide a determinate criterion for saying how much . . . is too much." *Id.* at 475, 121 S.Ct. at 913 (internal quotations omitted). As an example of this theory, the Supreme Court cited a similar case where it noted that the statute need not decree "how 'imminent' was too imminent, or how 'necessary' was necessary enough, or . . . how 'hazardous' was too hazardous." *Id.* (citing *Touby v. United States,* 500 U.S. 160, 165-67, 111 S.Ct. 1752, 1756-57, 114 L.Ed.2d 219 (1991)).

It is from this analysis in *Whitman* that similarities can be seen between the text of § 465 of the IRA and the text of § 109(b)(1) of the Clean Air Act. The Clean Air Act permits the Administrator to set air quality standards that "are requisite to protect the public health," while the IRA permits the Secretary to acquire land in trust for Indians "to conserve and develop Indian lands and resources." It is conceded by the Court that the act of acquiring land is different from the act of setting air quality standards, however, the authority that these statutes bestow upon executive branch officials is effectively the same. Therefore, by extending the Supreme Court's holding in *Whitman* to the facts of this case, it must be concluded that § 465 sets forth sufficient "boundaries" on the Secretary's authority and that it is not an unconstitutional delegation of legislative authority.

Finally, it is worthy of note that since the Eighth Circuit's panel opinion adjudging § 465 unconstitutional was vacated, several other circuits have weighed in on the matter and held that § 465 is not an unconstitutional delegation of authority to the Secretary. *See United States v. Roberts,* 185 F.3d 1125, 1136-37 (10th Cir.1999); *Confederated Tribes of Siletz Indians of Oregon v. United States,*

110 F.3d 688, 698 (9th Cir.1997) (stating that "[t]he general delegation of power to the Executive to take land into trust for the Indians is a valid delegation because Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used"); *see also Carcieri,* 290 F.Supp.2d at 187 (finding persuasive the Tenth Circuit's delegation analysis in *Roberts*). Thus, upon review of the text of § 465, its legislative history, and in light of the cases decided after the Eighth's Circuit opinion in *Oacoma I,* it is the opinion of this Court that Congress has clearly delineated the "boundaries" of the Secretary's authority as bestowed upon him by § 465.

CONCLUSION

For the foregoing reasons, it is the opinion of this Court that the Secretary's actions were not arbitrary, capricious, or an abuse of discretion. Furthermore, in conformity with the Court's previous opinion, it remains the decision of this Court "that 25 U.S.C. § 465 is constitutional both on its face and as applied in this case." *See South Dakota,* CIV. 92-3023 at 22. Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment (Docket # 82) is denied.

IT IS FURTHER ORDERED that Interior's motion for summary judgment (Docket # 96) is granted. Judgment shall be issued in favor of defendants and against plaintiffs.

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519 U.S. 919

Supreme Court of the United States
DEPARTMENT OF THE INTERIOR, et al.,
petitioners,
v.
SOUTH DAKOTA, et al.
No. 95-1956.

Oct. 15, 1996.

Case below, 69 F.3d 878.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit with instructions to vacate the judgment of the United States District Court for the District of South Dakota and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision.

Justice SCALIA, with whom Justice O'CONNOR and Justice THOMAS join, dissenting.

This case arises from the 1990 action of the Department of the Interior acquiring 91 acres in trust for the Lower Brule Tribe of the Sioux Indians, pursuant to § 5 of the 1934 Indian Reorganizations Act (IRA), 48 Stat. 985, as amended, 25 U.S.C. § 465. Respondents challenged this action in Federal District Court, contending both that the Department's particular action violated the Administrative Procedure Act (APA), 5 U.S.C. § 706, and that the Secretary's statutory authority to acquire lands under the IRA is unconstitutional as a delegation of legislative power.

Throughout this litigation, until now, it has been the Department's position that IRA land acquisitions are unreviewable under the APA because they fall within the

exception for matters "committed to agency discretion by law." § 701(a)(2). The District Court agreed that APA review was unavailable, although on different grounds, holding that since the United States had acquired title, the Quiet Title Act (QTA), 28 U.S.C. § 2409a, provided the sole statutory means of challenging the action, and that the QTA explicitly prohibits actions challenging title to Indian lands. The District Court also upheld the Secretary's constitutional authority to acquire land on behalf of the United States under the IRA. The Court of Appeals for the Eighth Circuit, however, reversed on the ground that § 5 of the IRA constitutes a delegation of legislative power to the Secretary of the Interior and is hence unconstitutional. 69 F.3d 878 (1995).

Following the Eighth Circuit's sweeping decision, the Department of the Interior did an about-face with regard to the availability of judicial review under the APA. It promulgated a new regulation providing that "the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust," and that "the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." Department of the Interior, Land Acquisitions (Nongaming), 61 Fed.Reg. 18083 (1996) (to be codified at 25 C.F.R. § 151.12). The preamble to that regulation recites that it is being adopted "[i]n response to a recent court decision, *State of South Dakota v. U.S. Department of the Interior,* 69 F.3d 878 (8th Cir.1995)," and asserts that the procedure it sets forth "permits judicial review before transfer of title to the United States." The Solicitor General now represents to us that it is the position of the Department of the Interior, as well as that of the Department of

Justice, that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action will continue to be barred by the QTA after the United States formally acquires title.

The decision today – to grant, vacate, and remand in light of the Government's changed position – is both unprecedented and inexplicable. This Court has in recent years occasionally entered a "GVR" in light of a position newly taken by the Solicitor General *where the United States was the prevailing party below. See, e.g., Stutson v. United States,* 516 U.S. 193, 116 S.Ct. 600, 133 L.Ed.2d 571 (1996) (*per curiam*); *Schmidt v. Espy,* 513 U.S. 801, 115 S.Ct. 43, 130 L.Ed.2d 5 (1994); *Wells v. United States,* 511 U.S. 1050, 114 S.Ct. 1609, 128 L.Ed.2d 337 (1994); *Reed v. United States,* 510 U.S. 1188, 114 S.Ct. 1289, 127 L.Ed.2d 644 (1994); *Chappell v. United States,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990). Even that extension of our earlier practice is in my view unsound. *See Lawrence v. Chater,* 516 U.S. 163, 184-186, 116 S.Ct., 604, 615-616, 133 L.Ed.2d 545 (1995) (SCALIA, J., dissenting). But we have never before GVR'd simply because the Government, having *lost* below, wishes to try out a new legal position. The unfairness of such a practice to the litigant who prevailed in the Court of Appeals is obvious. ("Heads I win big," says the Government; "tails we come back down and litigate again on the basis of a more moderate Government theory.") Today's decision encourages the Government to do what it did here: to "go for broke" in the courts of appeals, rather than get the law right the first time.

What makes today's action inexplicable as well as unprecedented is the fact that the Government's change of legal position *does not even purport to be applicable to the*

present case. The Government now concedes only that APA review is available before the Secretary's taking of title under the IRA; it has not altered its view that once title has passed to the United States APA review is precluded by the QTA. 28 U.S.C. § 2409a(a); Pet. for Cert. 7. Since in this case title has passed, the Government's position in the present litigation remains what it was: Judicial review is unavailable.

The Government contends, however, that the Court of Appeals' determination that the IRA was a delegation of legislative power was based in part upon the unavailability of judicial review. I fail to see how the availability of judicial review has anything to do with that question; perhaps the Court of Appeals thought otherwise, though its opinion on this point is somewhat contradictory.* If, however, judicial reviewability *was* germane to the Court of Appeals' judgment, surely it was only such reviewability as would exist *of right,* and not such as would be accorded only at the discretion of the agency. It is merely the latter that we have here: The Government concedes only that, *if* the Secretary chooses to announce his acquisition decision *before* the acquisition becomes effective (as the new regulation graciously requires), judicial review is available. It

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* At one point the court quoted approvingly its statement in *United States v. Garfinkel,* 29 F.3d 451, 459 (CA8 1994), that "'[j]udicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge.'" 69 F.3d 878, 882 (1995). This seems inconsistent, however, with the approach the court takes elsewhere in its opinion, when it says: "We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue." *Id.,* at 881, n. 1.

is inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals.

Finally, the existence of the new regulation does not make this a case in which a postjudgment change in the law applicable to the dispute warrants a remand. The preamble to the regulation acknowledges that "the Eighth Circuit decision precludes the Secretary from taking into trust the land at issue in that particular case," and explicitly states that "[t]he procedure announced in today's rule . . . will apply to all *pending* and *future* trust acquisitions." 61 Fed.Reg. 18083 (1996) (emphasis added). Of course that statement merely recites the obvious, since, title *already* having been acquired in this case, it is quite impossible for the Secretary to provide 30-day advance notice of intent to take title. Evidently for that reason, the Government asks this Court, if it declines to grant certiorari, not merely to GVR, but to do so "with instructions that the judgment of the district court sustaining the Secretary's decision also be vacated and that the matter, in turn, be remanded to the Secretary of the Interior for reconsideration and issuance of a new administrative decision." Pet. for Cert. 25. I cannot imagine where we would derive the authority for this. If, as the Government asserts in its brief, statutory judicial review of a land-trust decision under § 5 of the IRA is unavailable once title has passed to the United States, then certainly federal courts cannot construct the necessary conditions for judicial review by simply ordering the land acquisition undone.

In sum, there is no basis in precedent or in reason for a GVR in the present case. Since a federal statute has

been held unconstitutional, I would grant the petition for certiorari.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2344SDRC

State of South Dakota, et al.,	*	
	*	
Appellants,	*	Order Denying Petition for
	*	Rehearing and Suggestion
v.	*	for Rehearing En Banc
	*	
United States Department of Interior, et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian, Judge Beam, and Judge Murphy would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

February 2, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

69 F.3d 878

United States Court of Appeals,
Eighth Circuit.

STATE OF SOUTH DAKOTA; City of Oacoma, South Dakota, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF the INTERIOR; Eddie F. Brown, Assistant Secretary-Indian Affairs; Jerry Jaeger, Acting Area Director, Bureau of Indian Affairs, Defendants-Appellees.

No. 94-2344.

Submitted Feb. 15, 1995.
Decided Nov. 7, 1995.

John P. Guhin, Assistant Attorney General, Pierre, South Dakota, argued (Steven R. Smith, on the brief), for appellant.

Lisa E. Jones, U.S. Department of Justice, Washington, D.C., argued (Mikal G. Hanson, Edward J. Shawaker and Andrea Nervi Ward, on the brief), for appellee.

Before MAGILL, LOKEN, and MURPHY, Circuit Judges.

LOKEN, Circuit Judge.

The State of South Dakota and the City of Oacoma, South Dakota, appeal the district court's dismissal of their challenge to the Secretary of the Interior's acquisition of commercial land in trust for the Lower Brule Tribe of Sioux Indians. Concluding that 25 U.S.C. § 465, the statute authorizing acquisition of the land, is an unconstitutional delegation of legislative power, we reverse.

I.

In March 1990, the Tribe submitted an application under 25 U.S.C. § 465, asking the Secretary to acquire ninety-one acres of land in trust for use by the Tribe. The land is located seven miles from the Tribe's reservation and is partially within the City of Oacoma. The Tribe stated that the land would be used to create an industrial park adjacent to an interstate highway, explaining that "[t]his site, Trust status for the land, and tax advantages are critically necessary for the development to occur."

The State of South Dakota and the City of Oacoma protested in writing to the Secretary's Bureau of Indian Affairs ("BIA"). When BIA's Area Director notified the State and the City in March 1991 that the Tribe's application would be approved, they appealed to the Interior Board of Indian Affairs. BIA then disclosed that the Assistant Secretary for Indian Affairs had approved the application in December 1990, without notifying the protestants. The Board dismissed the appeal because it has no jurisdiction to review decisions by the Assistant Secretary. *State of South Dakota & Town of Oacoma v. Aberdeen Area Director, BIA,* 22 I.B.I.A. 126 (1992).

In July 1992, the State and the City filed this action against the Department of the Interior and certain of its officials seeking judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. For convenience, we will refer to the defendants collectively as "the Secretary," because he is the Executive Branch official authorized to act under § 465. We will refer to the State and the City collectively as "plaintiffs."

Plaintiffs allege that they are aggrieved by the Secretary's acquisition because it deprives them of tax revenues

and may place the land beyond their regulatory powers. They contend that the acquisition is invalid because § 465 is an unconstitutional delegation of legislative power. Alternatively, they contend (i) that the agency violated its internal rules of procedure and the Assistant Secretary acted beyond the scope of his delegated authority; (ii) that the approval was arbitrary and capricious and not in accordance with the agency's governing regulations, *see* 25 C.F.R. §§ 151.1-.14; and (iii) that the Tribe plans to develop the land as a gaming casino and the Secretary was aware of the Tribe's true intentions but failed to comply with the approval procedures of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

In November 1992, the Secretary took title to the lands in trust for the Tribe. In January 1994, the Secretary moved to dismiss on the ground that a § 465 acquisition is action "committed to agency discretion by law" and therefore not subject to judicial review. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney,* 470 U.S. 821, 828-30, 105 S.Ct. 1649, 1654-55, 84 L.Ed.2d 714 (1985). The district court granted the motion to dismiss, concluding that § 465 is not an unconstitutional delegation of legislative power because the statute identifies the agency to which power is delegated and "clearly delineates the general policy to be applied and the bounds of that delegated authority." Without reaching the "committed to agency discretion" issue, the court also held, *sua sponte,* that it had no jurisdiction to review plaintiffs' other claims because the Quiet Title Act, 28 U.S.C. § 2409a, which permits the

United States to be sued to resolve real property disputes, "does not apply to trust or restricted Indian lands."[1]

II.

On appeal, plaintiffs argue that § 465 provides no legislative standards or boundaries governing the Secretary's acquisitions. The Secretary responds that the statutory purpose of "providing land for Indians" sufficiently defines the general policy and boundaries of the delegated power. The Secretary notes that the Supreme Court has not invalidated a federal statute on delegation grounds since *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 542, 55 S.Ct. 837, 848, 79 L.Ed. 1570 (1935), and *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Interestingly, the same Congress enacted both the Indian Reorganization Act, of which § 465 was a part, and the statutes invalidated in *Schechter Poultry* and *Panama Refining.* It is appropriate to consider whether § 465 satisfies the nondelegation

[1] The court relied on *State of Florida v. United States Dep't of the Interior,* 768 F.2d 1248 (11th Cir.1985), *cert. denied,* 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). *Contra, City of Sault Ste. Marie v. Andrus,* 458 F.Supp. 465, 470-72 (D.D.C.1978). We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue. The court in *Florida* conceded that the Quiet Title Act does not bar claims "that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land." 768 F.2d at 1255 n. 9.

doctrine as it has evolved since 1935, particularly because no other appellate court has done so.[2]

The nondelegation doctrine is easy to state: "Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 1755, 114 L.Ed.2d 219 (1991) (citation omitted). It is difficult to apply. A court must inquire whether Congress "has itself established the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry,* 295 U.S. at 530, 55 S.Ct. at 843. But the court must be mindful that the doctrine does not prevent Congress from obtaining the assistance of its coordinate Branches. Therefore, so long as Congress "lay[s] down by legislative act an intelligible principle" governing the exercise of delegated power, it has not unlawfully delegated its legislative power. *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928), quoted in *Touby,* 500 U.S. at 165, 111 S.Ct. at 1755, and *Mistretta v. United States,* 488 U.S. 361, 372, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989). A delegation is overbroad "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States,* 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944).

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[2] To our knowledge, only one other district court has considered the nondelegation question in the sixty-year life of the statute, and its perfunctory analysis is unpersuasive. *See City of Sault Ste. Marie,* 458 F.Supp. at 473.

The Supreme Court has recognized that judicial review is a relevant safeguard in considering delegation issues:

> It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219, 109 S.Ct. 1726, 1731, 104 L.Ed.2d 250 (1989), *quoting American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). Justice Marshall eloquently stated this principle in his concurring opinion in *Touby:* "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." 500 U.S. at 170, 111 S.Ct. at 1758. Thus, when the Secretary argued to the district court that his actions under § 465 may not be judicially reviewed *because the statute commits them entirely to agency discretion,* he implicitly acknowledged that this delegation issue requires a particularly close look. *See United States v. Garfinkel,* 29 F.3d 451, 459 (8th Cir.1994) ("[J]udicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge") (citation omitted).

We begin by examining the very broad language of § 465:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.

* * *

> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be "for Indians." It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.

The Secretary's power to purchase land under § 465 triggers the complementary power to acquire land by condemnation under 40 U.S.C. § 257. *See United States v. 29 Acres of Land,* 809 F.2d 544, 545 (8th Cir.1987). It is therefore appropriate to consider the delegation question in the context of the federal government's extensive condemnation powers.

The power to acquire land by condemnation for a public purpose is an inherent aspect of sovereignty. *See Kohl v. United States,* 91 U.S. 367, 371-72, 23 L.Ed. 449 (1875). In exercising that power, Congress need not select the particular land to be taken; that function may be delegated to the Executive Branch. *See Chappell v. United*

States, 160 U.S. 499, 510, 16 S.Ct. 397, 400, 40 L.Ed. 510 (1896). So long as the condemnation serves a public use, "the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." *Mississippi & Rum River Boom Co. v. Patterson,* 98 U.S. 403, 406, 25 L.Ed. 206 (1878). However, "a claim that a taking is not 'for public use' is open for judicial consideration." *United States ex rel. T.V.A. v. Welch,* 327 U.S. 546, 557, 66 S.Ct. 715, 720, 90 L.Ed. 843 (1946) (Frankfurter, J., concurring).

It is settled that the United States may purchase land by condemnation for an Indian reservation as a public use. *See United States v. McGowan,* 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938); *State of Minnesota v. United States,* 125 F.2d 636, 640 (8th Cir.1942). That same power authorizes Congress to acquire non-reservation lands in trust for a public use that benefits Indians or Indian tribes. But the question under the nondelegation doctrine is, for what public use does § 465 authorize the Secretary to acquire land. By defining no boundaries to the exercise of this power, the statute leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation,[3] to provide farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer. These are very different public uses, and the last is, of course, no public use at all.

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[3] A separate provision of the Indian Reorganization Act specifically authorized the Secretary to acquire lands to form new reservations or to enlarge existing reservations. *See* 25 U.S.C. § 467. In *State of Minnesota, supra,* we upheld a condemnation under a different, far more specific statute after careful judicial review of the Secretary's decision.

Despite the government's broad, inherent power to acquire land for public use, the nondelegation doctrine surely requires at a minimum that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition. In some cases, the public use underlying each acquisition is obvious, as when Congress authorizes an agency to acquire lands and buildings to house the agency's operations. But when Congress authorizes the Secretary to acquire land in trust "for Indians," it has given the agency no "intelligible principle," no "boundaries" by which the public use underlying a particular acquisition may be defined and judicially reviewed. This legislative vacuum in turn greatly expands the extent of the standardless delegation.

III.

The legislative history of § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land "for Indians." The statute was enacted as section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985. The Report of the Committee on Indian Affairs stated:

> The bill now under consideration definitely puts an end to the allotment system through the operation of which the Indians have parted with 90,000,000 acres of their land in the last 50 years. . . . To make many of the now pauperized, landless Indians self-supporting, it authorizes a long term program of purchasing land for them.
>
> * * *
>
> *Section 5* authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.

> The title to land thus acquired will remain in the United States. The Secretary may permit the use and occupancy of this newly acquired land by landless Indians; he may loan them money for improvements and cultivation, but the continued occupancy of this land will depend on its beneficial use by the Indian occupant and his heirs.

H.R.Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934). In the House floor debate, Representative Howard, a chief sponsor of the bill, further explained the purpose of *section 5*:

> *Section 5* sets up a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially.... This program would permit the purchase of land for many bands and groups of landless Indians and would permit progress toward the consolidation of badly checkerboarded Indian reservations, as well as provide additional agricultural land to supplement stock grazing or forestry operations.

78 Cong.Rec. 11730 (June 15, 1934). Representative Howard characterized the acquisition of trust lands to be used for farming as "the keystone of the new Indian policy." 78 Cong.Rec. 11729. Representative Hastings described the land to be acquired as "Indian subsistence-homesteads." *Id.* at 9269.

This agrarian focus is not surprising in a Congress acting against the backdrop of an industrial sector ravaged by the Great Depression. Yet in drafting § 465, Congress failed to include standards to reflect its limited purpose. Instead, the Secretary was delegated unrestricted power to acquire land "for Indians" in a statute that

contained no "boundaries" defining how that power should be exercised. The Secretary has responded by asserting all of the unlimited power conferred by the statute's literal language. First, he promulgated regulations that place no restrictions on the purpose for which land may be placed in trust "for Indians." *See* 25 C.F.R. § 151.10. Second, when his acquisition procedures and decisions were challenged in court, he asserted that his exercise of this power is not subject to judicial review under the APA because it is "committed to agency discretion."

This case illustrates the problems created by the exercise of such unrestricted power. Intending only that the Secretary acquire rural lands suitable for farming, grazing, and logging by Indians, Congress in § 465 addressed only one intergovernmental issue – it made the lands taken in trust exempt from state and local property taxes. But when the Secretary acquires urban land for industrial or commercial uses, other important issues inevitably arise. For example, the South Dakota Attorney General asked the Secretary whether the City of Oacoma's ordinances, including its zoning ordinances, would be enforceable against the property if it was taken in trust. The Secretary's Field Solicitor responded:

> If the parcel is not declared to be part of the reservation, then ordinances which are civil or regulatory in nature and which do not affect the proprietary interest of the United States, acquired by virtue of acquisition of title to the land, *may* apply. *See State of Florida, supra; Mescalero Apache Tribe v. Jones,* [411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)].

(Emphasis added.) This answer suggests that the BIA will force the State and the City to establish their right to

regulate the trust land in court, where BIA will no doubt argue that state and local regulatory powers are pre-empted. The result is a legislative void. Congress, not the BIA, and indeed not the courts, should define in the first instance the extent to which lands taken in trust for industrial and commercial Indian use are thereby freed from state and local zoning ordinances, building codes, health and safety regulations, and other exercises of the police power.

Had the Secretary acted consistently with § 465's legislative history – by limiting his acquisition authority to purposes such as forming or enlarging reservations, restoring alienated allotment lands, and providing other lands for agrarian uses – we would face the question whether the statute's overbreadth was suitably slimmed by this legislative history and agency interpretation. Normally, delegation questions are considered in light of a statute's legislative history and context, *see Garfinkel,* 29 F.3d at 458, and any narrowing agency interpretation, *see International Union, UAW v. OSHA,* 938 F.2d 1310 (D.C.Cir.1991); 37 F.3d 665 (D.C.Cir.1994) (decision after remand). But in this case, the agency has interpreted the statute as broadly as possible, consistent with its literal language. We have approved that interpretation in another context and as a panel may not overrule a prior panel opinion. *See Chase v. McMasters,* 573 F.2d 1011, 1015-16 (8th Cir.1978), *cert. denied,* 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). Moreover, if we now took a more limited view of the statute, the Secretary's regulations would be overbroad, and there would be no basis upon which to uphold this acquisition. Thus, we conclude that we must accept the agency's interpretation and

construe the statute literally for purposes of applying the nondelegation doctrine.

IV.

There are additional, procedural aspects of the Secretary's acquisition program that further support our decision. The administrative record reveals that the Tribe purchased the land in question for $80,255.94, three months *after* it filed the § 465 application, and after the BIA's Lower Brule Agency had recommended favorable action on the application. The record does not disclose (i) whether the purchase price was based upon tax free commercial use by the Tribe, and (ii) the price the United States paid when it acquired the land from the Tribe in November 1992. Plaintiffs criticize the administrative record as contrived and inadequate. The Secretary argues that procurement practices of the Tribe and BIA under § 465 are not subject to judicial review.

There are many opportunities for abuse in a program of this nature. For example, a seller who knows that land is being sold for a tax free use will charge more for that land, thereby capturing some of the economic benefit of tax free status that Congress intended for the Indians. Here, if the Tribe paid such a monopoly rent, the congressional purpose has been frustrated. But if the Secretary reimbursed the Tribe for that purchase price, the taxpayers have suffered from agency ignorance or misfeasance. Given the extensive standards that Congress has built into other procurement programs, *see, e.g.*, 10 U.S.C. Ch. 159; 41 U.S.C. §§ 251-260, the total absence of procurement principles and safeguards in § 465 violates the nondelegation doctrine.

V.

Those who drafted § 465 failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power. The result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles.

In his concurring opinion in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-86, 100 S.Ct. 2844, 2886, 65 L.Ed.2d 1010 (1980), Justice (now Chief Justice) Rehnquist summarized the functions of the nondelegation doctrine as articulated in prior Supreme Court cases:

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards.

(Citations omitted.) We conclude that § 465 fails all three of these nondelegation criteria and is invalid. Accordingly,

the Secretary had no authority to acquire the lands in question in trust for the Tribe. The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

MURPHY, Circuit Judge, dissenting.

The court in this case unnecessarily reaches a constitutional issue and bases its conclusions on speculation rather than the record. Its decision that a portion of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power is not supported by the statute or its legislative history. The court invalidates today a congressional enactment designed to acquire land in trust for Indians that has been in place for over sixty years and, in the process, places in doubt the status of all Indian trust land. I must therefore dissent.

I.

The primary focus of the appeal taken by the State of South Dakota and the City of Oacoma (plaintiffs) is the district court's dismissal for lack of jurisdiction of their claims brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701-706. The Department of the Interior and the two individually named defendants (collectively, the Secretary) had argued on their motion to dismiss that judicial review of the APA claims is unavailable because the decision whether to acquire land in trust is committed to agency discretion. Plaintiffs disagreed and also challenged the constitutionality of the statute authorizing land to be taken into trust, § 465 of the Indian Reorganization Act. The district court found the statute to be constitutional and did not reach the issue of the availability of

judicial review. Instead it concluded sua sponte that it lacked jurisdiction over the APA claims because the United States has not waived its sovereign immunity for claims relating to Indian trust land.

Rather then addressing the jurisdictional issue, the majority stretches to consider the constitutionality of the underlying statute. A cardinal principle guiding federal courts is that constitutional issues should not be reached unless necessary to a decision. *Jean v. Nelson,* 472 U.S. 846, 854, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984). The court suggests, but does not decide, that the district court had jurisdiction to consider the claims brought under the APA. If so, the principle of judicial restraint should lead to consideration of those claims prior to reaching any constitutional issue. Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the plaintiffs.

Moreover, resolution of the APA inquiry could inform the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation. *See United States v. Garfinkel,* 29 F.3d 451, 459 (8th Cir.1994). Although the court recognizes this principle, it relies on the Secretary's mere assertion that his decision is unreviewable to support its conclusion that the delegation is unlawful.

II.

Even if the court had reason to address the delegation issue at this time, its decision strays far from the existing path of nondelegation doctrine. Congressional delegations of legislative power are valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States,* 488 U.S. 361, 372-73, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989) (quoting *American Power & Light Co. v. SEC,* 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946)). To assess whether a statute imposes sufficient boundaries on the delegated authority, a reviewing court looks at the language of the statute, its purpose and factual background, and the statutory context in which the standards appear. *United States v. Garfinkel,* 29 F.3d 451, 458 (8th Cir.1994) (citing *American Power & Light Co. v. SEC,* 329 U.S. 90, 104, 67 S.Ct. 133, 141-42, 91 L.Ed. 103 (1946)). A statute written in broad terms does not violate the Constitution so long as Congress lays down an "intelligible principle" to guide the agency's discretion. *Touby v. United States,* 500 U.S. 160, 165, 111 S.Ct. 1752, 1755-56, 114 L.Ed.2d 219 (1991); *Garfinkel,* 29 F.3d at 457.

Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority. Since 1935, the Supreme Court has consistently upheld statutes involving broad delegations of authority. *See e.g., Mistretta v. United States,* 488 U.S. 361, 372-73, 109 S.Ct. 647, 654-55, 102 L.Ed.2d 714 (1989) (authority to promulgate sentencing guidelines for federal criminal offenses); *Lichter v. United States,* 334 U.S. 742, 785-86, 68 S.Ct. 1294, 1316-17, 92 L.Ed. 1694 (1948) (authority to determine excessive profits); *American Power & Light Co. v.*

SEC, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946) (authority to prevent unfair or inequitable distribution of voting power among security holders); *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (authority to fix commodity prices that would be fair and equitable and would effectuate purpose of Emergency Price Control Act of 1942); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 600, 64 S.Ct. 281, 286-87, 88 L.Ed. 333 (1944) (authority to determine just and reasonable rates); *National Broadcasting Co. v. United States,* 319 U.S. 190, 225-26, 63 S.Ct. 997, 1013, 87 L.Ed. 1344 (1943) (authority to regulate broadcast licensing for "public interest, convenience, or necessity"). The delegation doctrine has in fact evolved into a tool of statutory construction, by which reviewing courts give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *See Mistretta,* 488 U.S. at 373 n. 7, 109 S.Ct. at 655 n. 7.

Although the court notes that the same Congress passed the Indian Reorganization Act and the statutory provisions found unconstitutional in 1935 on delegation grounds, it does not attend to the striking differences between the statutes. The National Industrial Recovery Act (NIRA), 48 Stat. 195 (1933),[1] contained the unconstitutional provisions struck down in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 531, 55 S.Ct. 837, 843-44, 79 L.Ed. 1570 (1935) (provision authorizing the President to approve codes of fair competition for a trade or industry) and *Panama Refining Co. v. Ryan,* 293 U.S.

[1] This statute was later amended by 49 Stat. 375 (1935), which repealed the provisions relating to codes of fair competition and provided for the expiration of Title I of the Act in 1936.

388, 406, 55 S.Ct. 241, 242, 79 L.Ed. 446 (1935) (provision granting the President discretion to prohibit interstate and foreign commerce of certain petroleum products). The NIRA represented the Roosevelt administration's response to a national emergency caused by widespread unemployment and economic disruption during the Depression. *See* 48 Stat. 195, Title I, section 1. It granted the President unfettered discretion to approve any law, and impose his own conditions on it, relating to a "vast array of commercial and industrial activities throughout the country." *Schechter,* 295 U.S. at 539, 55 S.Ct. at 847. The Indian Reorganization Act in contrast did not convey such unbridled discretion to another branch, and it is one of a long line of enactments reflecting the special role the federal government has played with respect to Indian tribes. *See* F. Cohen, *Handbook of Federal Indian Law* 68-88 (reprint ed. 1988) (reviewing federal Indian legislation starting from 1789).

The court today departs from precedent like *Mistretta* by invalidating a statute as an unlawful delegation based on the broadest possible reading of its terms. In the course of its discussion, it focuses on unlikely hypothetical uses of the Secretary's delegated authority and ignores the limiting effect of the context in which the statute was passed.

Prior to 1934, Congress pursued an allotment policy with regard to Indian land. *See id.* at 78-83. Existing Indian tribal land was allotted to individual Indians, and surplus lands were sold to whites. Although the purpose of the policy was to encourage assimilation, it resulted most significantly in the loss of Indian land as individual allotments were sold to non-Indians, lost through tax forfeiture or otherwise alienated. *See Shangreau v. Babbitt,* 68 F.3d 208 (8th Cir.1995). Between 1887 and 1934,

Indian land holdings were reduced from 138 million acres to 48 million, a loss of 90 million acres. F. Cohen, *Handbook of Federal Indian Law* 138 (1982 ed.).

Discontent with the allotment policy caused Congress to enact the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, to stem the loss of Indian lands and to assist Indians in acquiring land adequate for self-support. *See Chase v. McMasters,* 573 F.2d 1011, 1016 (8th Cir.), *cert. denied,* 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). The purpose of the Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong.2d Sess., 1 (1934)). The Act rejected assimilation as a goal and instead sought Indian self-determination. The portion of the Act under attack here, 25 U.S.C. § 465, specifically addresses the problem of the loss of Indian land and authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians."

The text of the Act gives the Secretary broad discretion to acquire land in trust, but it also limits that discretion explicitly. It directs that any land acquired must be for Indians as they are defined in 25 U.S.C. § 479. It authorizes the appropriation of a limited amount of funds with which land could be acquired and specifically prohibits its use of such funds to acquire land for the Navajo Indians outside of their established reservation boundaries in Arizona and New Mexico.

The court's conclusion that the statutory language does not give the Secretary adequate direction ignores the

Act's historical context. Although § 465 uses broad language, its direction that land be acquired "for the purpose of providing land for Indians," has specific meaning in light of the failure of the allotment policy and Congressional rejection of assimilation as a goal. It instructs the Secretary that land should be acquired to replace the millions of acres of Indian land lost as a result of the allotment policy and placed in trust to prevent its alienation. This interpretation is reinforced by related provisions in the Act which specifically prohibit features of the allotment system. Such provisions, for example, prohibit allotment of reservation land to individual Indians, 25 U.S.C. § 461, extend existing periods of trust and restrictions on alienation on any Indian lands, 25 U.S.C. § 462, authorize restoration of surplus lands to tribal ownership, 25 U.S.C. § 463, and prohibit the transfer of restricted Indian lands except to Indian tribes. 25 U.S.C. § 464.

The Secretary's authority is also limited by the guidance provided in the legislative history of the Indian Reorganization Act. *See Mistretta,* 488 U.S. at 376 n. 10, 109 S.Ct. at 657 n. 10. That history explains that § 465 was enacted in response to the loss of 90 million acres that resulted from the operation of the allotment system, H.R.Rep. No. 1804, 73d Cong.2d Sess., 6 (1934), and identifies goals of "rehabilitat[ing] the Indian's economic life" and "develop[ing] the initiative destroyed by . . . oppression and paternalism." *Mescalero,* 411 U.S. at 152, 93 S.Ct. at 1272. Its various provisions were designed to encourage tribal enterprise and enable Indians "to enter the white world on a footing of equal competition." *Id.* at 157, 93 S.Ct. at 1275, citing 78 Cong.Rec. 11732. The legislative history also directs that after land is acquired in trust, the Secretary must assure continued "beneficial

use by the Indian occupant and his heirs." H.R.Rep. No. 1804 at 7. *See also City of Tacoma v. Andrus,* 457 F.Supp. 342 (D.D.C.1978).

The availability of judicial review of the Secretary's actions may also serve to limit the delegation here. *See Garfinkel,* 29 F.3d at 459. Judicial review "is a factor weighing in favor of upholding a statute against a non-delegation challenge." *Id.* The majority focuses on the Secretary's claim that such review is not available under the APA in this case, but does not consider the issue, which has not yet been developed in the trial court.

The majority chooses to disregard the limits on the Secretary's authority and the principles that guide the exercise of his discretion. It claims that it cannot consider narrowing constructions because it is bound by the holding in *Chase v. McMasters,* 573 F.2d at 1015-16. *Chase* did not hold that § 465 grants the Secretary unlimited authority to acquire land, however, but merely rejected the suggestion that the authority is limited to acquiring land for landless Indians and concluded that § 465 authorized the Secretary to accept conveyance of title to land already owned in fee by an Indian.

Although the court recognizes that it is bound by the holding in *Chase,* it rejects the interpretation there of the legislative history of § 465 when it claims that Congress meant only to provide agrarian land for landless Indians. It states its own view that Congress only intended "that the Secretary acquire rural lands suitable for farming, grazing, and logging by Indians." Not only is this interpretation of the legislative history contrary to *Chase,* but the majority's approach turns the nondelegation doctrine on its head. Instead of using the legislative history to inform

its reading of the statute, the court uses it in an attempt to establish a line beyond which authority could not lawfully be delegated. The relevant question for the nondelegation doctrine, however, is whether the statute contains sufficient standards to meet the constitutional requirement of specificity.

Plaintiffs' allegations raise state and local concerns related to taxation and regulation of land and possible gambling operations. These concerns appear to have influenced the majority, but they are not directly relevant to the constitutional analysis. Whether federal policy should support the taking of land into trust for Indian tribes is up to the other branches of government, not the judiciary.

In its discussion the court does not limit itself to the specific land acquisition at issue in this case, but instead hypothesizes that the Secretary, as head of an "agency fiefdom," may "purchase the Empire State Building in trust for a tribal chieftain as a wedding present" or "provide a lake home for a politically faithful tribal officer." This is pure speculation. Whether such transactions would be permissible under the statute are not questions raised by this case, and the Secretary's regulations make it unlikely that such scenarios could arise.[2]

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[2] Contrary to the court's assertion that the Secretary has asserted "unlimited power," the regulations reflect the Congressional concern that the land be acquired for the benefit of Indians. 25 C.F.R. § 151.1-151.15. The Department's land acquisition policy for tribes and for individual Indians is stated in 25 C.F.R. § 151.3:

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status

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The record indicates that the land at issue here was part of the Tribe's original reservation, but was later lost. The land was purchased by the Tribe after it had been zoned for industrial purposes, and the Tribe stated that it intended to develop an industrial park on it. Any attempt to develop a gambling casino on trust land would be subject to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which requires both consideration by the

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1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or,

2) when the tribe already owns an interest in the land[;] or,

3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status

1) when the land is located within the exterior boundaries of an Indian Reservation, or adjacent thereto; or,

2) when the land is already in trust or restricted status.

The regulations also list specific factors to be considered when evaluating a request. These include the need for the individual Indian or the tribe for additional land, the purposes for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land for the tax rolls, and jurisdictional problems and potential conflicts of land use which may arise. 25 C.F.R. § 151.10 (April 1995).

The Secretary promulgated new regulations on June 23, 1995 which require that state and local governments which are affected by a proposed acquisition be notified and given time to respond. 25 C.F.R. §§ 151.10, 151.11 (60 F.R. 32879, June 23, 1995). Although the old regulations do not set out such a notice requirement, it was apparently done in practice. The State and city in this case both were notified and responded. The 1995 regulations also provide several additional factors to consider for off-reservation land acquisitions.

Secretary of various factors and approval by the governor of the State. 25 U.S.C. § 2719(b)(1).[3] The hypothetical "opportunities for abuse" the majority fears are not based on the record here and do not provide a sufficient basis to strike down an act of Congress.

For all the reasons stated, the court is wrong in finding § 465 of the Indian Reorganization Act of 1934 an unconstitutional delegation of legislative authority. The district court should not be reversed on this basis. The Act was intended "to rehabilitate the Indian's economic life" and "to develop the initiative destroyed by a century of oppression and paternalism," *Mescalero,* 411 U.S. at 152, 93 S.Ct. at 1272, and the Congressional delegation of authority for that purpose is principled and proper.

III.

The nonconstitutional issues on the appeal need to be addressed, and one of these requires reversal. Plaintiffs claim under the APA that the Department failed to follow its own procedures when it reviewed and approved the Tribe's request to take land into trust,[4] that the Assistant

[3] This statute also provides that nothing in the section limiting gaming on trust land "shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c).

[4] Plaintiffs assert that the Assistant Secretary for Indian Affairs failed to consider on the record the factors listed in 25 C.F.R. § 151.10. Specifically, they claim that the Assistant Secretary did not know the actual purposes for which the land would be used, did not explain the need of the Tribe for additional land, and did not consider the jurisdictional problems and potential conflicts of land use which might arise, or the effect of the removal of the land from the tax rolls. They also assert that the Assistant Secretary did not consider whether the acquisition

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Secretary acted beyond the scope of his delegated authority, and that the decision to take the land into trust was arbitrary, capricious and an abuse of discretion. The district court relied on the analysis in *State of Florida v. United States Department of the Interior,* 768 F.2d 1248 (11th Cir.1985), *cert. denied,* 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986), to conclude that the Quiet Title Act (QTA), 28 U.S.C. § 2409a, precludes review in this case and that it therefore lacked jurisdiction. The QTA permits the United States to be sued to resolve real property disputes, but by its terms it does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a. For the reasons discussed below, I would reverse and remand for further proceedings.

The APA waives the sovereign immunity of the United States and federal officers for challenges to an agency action in which the relief sought is not money damages. 5 U.S.C. § 702. The broad waiver of immunity contains an exception, however:

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. The QTA, 28 U.S.C. § 2409a, is one such "other statute that grants consent to suit" referred to in the APA waiver provision. *Block v. North Dakota ex rel. Board of University and School Lands,* 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). The QTA provides that:

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was consistent with 25 C.F.R. § 151.3, which describes when land outside the reservation may be acquired, and did not follow procedures described in memoranda issued by the Secretary of the Interior.

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

28 U.S.C. § 2409a. It also provides that this section permitting suits against the United States "does not apply to trust or restricted Indian lands. . . . " *Id.*

The QTA is the exclusive means by which an adverse claimant can assert a property interest against the United States. *Block,* 461 U.S. at 286, 103 S.Ct. at 1819; *Ducheneaux v. Secretary of the Interior,* 837 F.2d 340, 343 (8th Cir.), *cert. denied,* 486 U.S. 1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988). If such a claim is barred by the provisions of the QTA because it involves title to Indian trust lands or the statute of limitations has run, for example, it cannot be brought under another statute. *Block,* 461 U.S. at 286, 103 S.Ct. at 1819; *Ducheneaux,* 837 F.2d at 343 (application of the QTA "preempts" review under the APA). The waiver of immunity in the APA does not apply to such claims. *Id.*

The key point here is these plaintiffs do not assert a property interest in the land. Instead they seek judicial review of the agency action by which land was acquired. The QTA would not provide consent to suit for such a claim, even if Indian trust lands were not involved. The question then is to what extent the QTA provisions limit the scope of the waiver of immunity in the APA for claims to which the QTA itself does not apply.

It would distort the meaning of the QTA to interpret it as impliedly forbidding all suits seeking to divest the United States of title to Indian trust land, including those

in which judicial review of the agency decision to acquire trust lands is invoked. The QTA was enacted to allow adverse claimants to assert their interests in real property by suing the United States. Its provisions set out the requirements for a valid complaint of this type. The exception for Indian lands was included to avoid the possibility that such suits be used to "abridg[e] the historic relationship between the Federal Government and the Indians without the consent of the Indians." H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4556-57. The statutory language simply states that the section does not apply to such lands. To say that Congress intended by this to foreclose any type of claim which could result in divestment of title to Indian trust land would require an excessively broad reading of the statute's language and its purpose.

State of Florida v. United States Department of the Interior, relied on by the district court, held that a suit challenging the United State's title to Indian trust land was impliedly forbidden by the QTA, even though it was not technically a suit to quiet title. 768 F.2d at 1253-55. That conclusion was based on a finding there that the suit challenged the tribe's conduct on the land, rather than the Secretary's decision to acquire the land, and thus did not seek review of an agency action. *Id.* at 1251. The *Florida* plaintiffs did not intervene during the trust application process, but complained only after the tribe began selling cigarettes and operating a bingo facility on the land.

In contrast, plaintiffs here seek review of an agency action. They actively opposed the land being taken into trust throughout the Department's review of the Tribe's application, and their claims specifically challenge the decision to acquire the land and the process by which that

decision was made. This case more closely resembles *City of Sault Ste. Marie v. Andrus,* 458 F.Supp. 465, 470-72 (D.D.C.1978), which held that the QTA did not preclude claims challenging the Department's decision to take land into trust.[5]

The nature of the relief sought in a challenge to existing title differs from that sought in a request for review of an administrative decision to acquire title. This is true even though both could result in divestment of title to Indian trust land. The *Florida* decision rests on the fact that the complaints in that case arose only after the land was taken into trust. In such circumstances divestment could interfere with an existing trust relationship. Although the plaintiffs in this case similarly ask that the trust acquisition be set aside,[6] the complaint seeks review of decisions made before the trust relationship was established. Challenging the acquisition of title is less intrusive to a trust relationship than challenging the status of existing title.

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[5] Plaintiffs in *Sault St. Marie* claimed that the tribe for which land was taken into trust was not a tribe within the meaning of the Indian Reorganization Act.

[6] The timing of the actual taking of the land into trust does not affect the analysis in this case. The final decision to take the land was made on December 13, 1990, but because of problems with the title, the actual acquisition did not occur until November 30, 1992. When this action was filed on July 13, 1992, it technically did not seek to divest the United States of title, but to prevent it from completing the acquisition. If the QTA were interpreted to preclude all claims to divest after acquisition, jurisdiction could have been lost on November 30, or possibly earlier. Because the QTA does not affect claims seeking the type of judicial review sought here, however, the date of the acquisition does not appear to be of critical importance.

In sum, the QTA does not prevent these plaintiffs from bringing an APA claim to challenge the Secretary's decision to take title to the land in trust for the Tribe, and the district court's dismissal of these claims should be reversed. In its motion for dismissal, the Department also raised the issue regarding the availability of judicial review which was not considered below. That issue should be resolved by the district court on remand.

For these reasons, I would reverse the judgment of dismissal and remand for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA and CITY OF OACOMA, Plaintiffs, vs. UNITED STATES DEPARTMENT OF THE INTERIOR; EDDIE BROWN, Assistant Secretary-Indian Affairs; and JERRY JAEGER, Acting Area Director, Bureau of Indian Affairs, Defendants.	CIV. 92-3023 MEMORANDUM OPINION (Filed April 1, 1994)

PROCEDURAL HISTORY

Plaintiffs the state of South Dakota and the city of Oacoma (plaintiffs) brought this action seeking judicial review of an administrative decision of the Department of the Interior (DOI), an agency of the United States. Plaintiffs also seek a declaration that the statute under which the DOI acted is unconstitutional. Pending are a motion to dismiss by defendants, a motion for summary judgment by plaintiffs, and several other motions tangential to these dispositive motions.

FACTS

A. March 30, 1990, Application of the Lower Brule Sioux Tribe

On March 30, 1990, the Tribal Chairman for the Lower Brule Sioux Tribe, a federally-recognized Indian

tribe, sent a letter to the Bureau of Indian Affairs (BIA) asking that a parcel of land adjacent to and lying partially within the town of Oacoma, South Dakota, be taken into trust for the benefit of the tribe.[1] *See* Exhibit to Attachment 17 of the Administrative Record (A.R. 17). The BIA is a subdivision of the DOI. The land, consisting of approximately 91 acres, lies seven miles south of the southernmost boundaries of the Lower Brule Sioux Reservation and adjacent to and partially within the city of Oacoma. On March 30, 1990, the BIA sent a letter to the Governor of South Dakota and the Mayor of Oacoma requesting comments on the proposed trust acquisition on the subjects of taxes, governmental services provided to the property, and zoning. A.R. 22, Exhibit 8.

B. April 26, 1990, Response of the State of South Dakota

On April 26, 1990, the state of South Dakota responded to the BIA's March 30 inquiry. A.R. 22, Exhibit 15. The state believed the BIA had provided insufficient information about the project to enable the state to respond intelligently. *Id.* Specifically, the state contended that it should be told the purpose for which the tribe intended to use the proposed trust lands. *Id.* Without this information, the state argued that it could not determine whether the proposal was suitable under 25 C.F.R. §§ 151.3(a)(3) and 151.10. *Id.* Furthermore, although the

[1] Although the tribe's request was officially made on March 30, 1990, apparently the tribe's intentions were known in advance of the March 30 letter. The administrative record reveals that as early as February 28, 1990, letters in resistance to the proposal were sent to the BIA. *See* A.R. 1-5, 22. Exhibit 6.

state was able to determine what the current taxes on the undeveloped property were, the state could not determine what the taxes would be once the property was developed because that issue depended on what improvements were made. *Id.* Likewise, the state could not venture an opinion as to how zoning laws would be affected without knowing the purpose for which the land would be used. *Id.*

The state also mentioned that "some had suggested that the tribe would use the land to build a gambling casino. A.R. 22, Exhibit 15. On this subject, the state informed the BIA that the governor of South Dakota was not prepared to say whether the state would allow gaming pursuant to 25 U.S.C. § 2719(b). *Id.* Rather, the state suggested that the tribe negotiate with the state for a gaming compact *prior to* the DOI's decision whether to take the land into trust. *Id.*

The final major issue raised by the state concerned criminal and civil jurisdictional problems which would arise if the land were taken into trust. A.R. 22, Exhibit 15. The state contended that the nearest tribal law enforcement officer was twenty-five miles away from the proposed trust land and that it would cause unnecessary criminal jurisdiction problems if law enforcement on the proposed parcel were to be handled by tribal police. *Id.* This concern was especially exigent, in the state's opinion, because part of the land was within the town of Oacoma. *Id.* The state also expressed concern over civil jurisdiction and stated that such things as the routine enforcement of contracts would become unnecessarily difficult. *Id.*

C. April 26, 1990, Response of the City of Oacoma

On April 26, 1990, the City of Oacoma responded to the March 30 letter from the BIA. A.R. 22, Exhibit 16. Oacoma like the state, contended that it had been provided too little information about the tribe's application to make an intelligent response. *Id.* Oacoma specifically decried the lack of information on the purpose for which the tribe intended to use the land and the reason why the tribe believed trust status was necessary to accomplish this purpose. *Id.*

However, based on the limited information conveyed to Oacoma, Oacoma gave the following responses. The taxes currently collected on the property were $326.88, although this figure would be higher if the land was developed. *Id.* The town of Oacoma currently provided law enforcement and fire protection services to the property. *Id.* The land which was within the city limits was zoned for commercial use. *Id.* In addition, Oacoma, like the state, expressed a great deal of concern over criminal and civil jurisdictional problems which the town believed would arise if the property were to be placed in trust. *Id.* Finally, Oacoma asked for time to submit a supplemental response to the agency after the BIA provided the town with a copy of the tribe's application.[2] *Id.*

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[2] Oacoma had made several Freedom of Information Act requests to the BIA and DOI for copies of the tribe's application to take the property into trust, but the agency had not complied. In fact, the BIA told Oacoma that Oacoma would have to request the application from the tribe and that it would be the tribe's decision whether to share a copy of the application with Oacoma. A.R. 22, Exhibit 14.

D. May 15, 1990, Opinion from the Office of the Solicitor

The Office of the Solicitor issued a letter on May 15, 1990, to the BIA Aberdeen Area Director attempting to answer the following questions originally raised by Oacoma. A.R. 13. The, letter was forwarded from the Aberdeen Area Director to the BIA Superintendent for the Lower Brule Agency on May 22, 1990.

1. If trust status were granted, would the property be considered "Indian country" for purposes of civil and criminal jurisdiction?

The opinion stated that the answer to this question depended on whether the DOI proclaimed the property to be added to the Lower Brule's existing reservation. *Id.* If so, the property would clearly become "Indian country" for jurisdictional purposes. *Id.*

If the property was merely taken into trust without being added to the reservation, state civil regulations which apply under other circumstances to the United States would also apply to the activities of others on the property. A.R. 13. As to criminal regulations, the opinion stated that state criminal laws would apply if the parcel did *not* qualify as a dependent Indian community. *Id.* If the parcel constituted a dependent Indian community, then tribal and federal criminal laws would apply. *Id.* The letter enclosed a 1982 opinion from the Office of the Solicitor on what constitutes a "dependent Indian community." *Id.*

2. If the answer to Question 1 is "yes," would Oacoma's ordinances, including zoning ordinances, be enforceable?

The opinion stated that if the property were also added to the reservation, no Oacoma ordinance would apply. A.R. 13. If the property were taken into trust but not added to the reservation, Oacoma's criminal ordinances would apply if the property were *not* a dependent Indian community. *Id.* If the property were taken into trust but not added to the reservation, Oacoma's civil ordinances which do not affect the proprietary interest of the United States *may* apply. *Id.* Oacoma could not collect real property taxes under any scenario and could only collect sales taxes if the property were not added to the reservation. *Id.* Oacoma could regulate the sale of alcoholic beverages only if the land were not added to the reservation and was not a dependent Indian community. *Id.* State law governing gambling would apply if the land were not added to the reservation and were not Indian country, but the federal Indian Gaming Regulatory Act would otherwise apply. *Id.*

3. Assuming that land placed in trust status is Indian country for jurisdictional purposes, can the Lower Brule Sioux Tribe consent to state jurisdiction?

The opinion stated that the tribe *could,* consent to state jurisdiction and outlined the procedure for obtaining such consent. A.R. 13.

4. Does the Town of Oacoma have any right to notice and hearing prior to the placement of land in trust?

The opinion answered this question in the negative, stating that 25 U.S.C. § 465 places the decision solely in the Secretary of the Interior's discretion with no requirement of notice and hearing. A.R. 13. However, the opinion also noted that DOI regulations provided a thirty-day comment period for appropriate local governmental units. A.R. 13.

E. May 17, 1990, Memorandum from Lower Brule Agency Superintendent to Aberdeen Area Director

On May 17, 1990, the BIA Superintendent for the Lower Brule Agency sent a memorandum to the BIA Area Director for the Aberdeen area. A.R. 15, The memorandum alleged that the Superintendent had reviewed the tribe's request and "evaluated the responses by the various governmental entities" and "the solicitor's response to Oacoma questions." *Id.* The memorandum discussed factors set forth in 25 C.F.R. § 151.10 and concluded that the federal government should take the land into trust for the benefit of the tribe. *Id.* Although the Superintendent acknowledged in the memorandum that the state and Oacoma had expressed concerns over jurisdictional problems, the memorandum did not discuss what these concerns were and merely concluded that the concerns were "overstated." *Id.* The complete packet concerning the proposed trust acquisition was transferred from the BIA Superintendent to the Aberdeen Area Director on May 25, 1990. A.R. 17.

F. June 1, 1990, Supplemental Response of the City of Oacoma

After having been provided a copy of the Lower Brule Sioux Tribe's request for land to be taken into trust, the city of Oacoma submitted a supplemental response to the DOI regarding that request. A.R. 22, Exhibit 22. The application revealed that the purpose for which the tribe intended to use the land was to pursue economic development through the creation of an industrial park which would include preferential employment opportunities for Native Americans. *Id.* Based on this purpose, Oacoma objected to the federal government's taking of the land into trust for the tribe. *Id.*

Specifically, Oacoma objected that the tribe had not shown that the property's trust status was essential for the proposed tribal development. A.R. 22, Exhibit 22. Oacoma argued that trust status was not essential because the tribe had an alternate site for the project on the tribe's reservation (and thus already in trust), where the program could be carried out equally successfully. *Id.* Oacoma also objected to the tribe's request on the grounds that Oacoma would be unduly burdened if it had to provide additional municipal services to the developed property without being able to assess taxes on the property to defray the costs of these additional services. *Id.*

G. June 29, 1990, Rebuttal from the Tribe

On June 29, 1990, the Lower Brule Sioux Tribe sent a letter to the BIA commenting on the responses which the state and Oacoma had sent to the BIA. A.R. 22, Exhibit 25. The tribe stated that, although it had for fifteen years maintained an industrial park within the reservation

boundaries, the park had not flourished because of "the stigma associated with Reservations, distance from the interstate highway," and lack of a servicing airport. *Id.* The tribe asserted that since it had purchased the land adjacent to Oacoma, several manufacturing firms had indicated interest in operating on the site. *Id.* The tribe was of the opinion that the advantages of the land being in trust (i.e., no property taxes), as well as the site's proximity to Interstate 90 and the presence of a nearby airport were necessary ingredients in attracting the attention of the industries that expressed interest in the proposed park. *Id.* The tribe also asserted that trust status was necessary because the tribe was unsophisticated and would not be able to command fair treatment in the "whiteman's [sic] world" without the federal government's assistance and protection. *Id.*

The tribe also contended that Oacoma did not currently provide any governmental services to the proposed trust property. A.R. 22, Exhibit 25. Specifically, the tribe stated that Oacoma did not provide snow removal, fire protection, solid waste removal, or water and sewage service. *Id.* The tribe stated that any businesses which located at the site would have to pay for these services themselves. *Id.*

On the issue of criminal jurisdiction, the tribe pointed out that Oacoma does not have its own police force but rather contracts for law enforcement services with the Lyman County Sheriff's Office. A.R. 22, Exhibit 25. The tribe stated that the sheriff's office has only one deputy on duty at a time and that the deputy must cover the entire county which is 48 miles by 52 miles. *Id.* Therefore, the tribe argued that response time from tribal police, located only seven miles from the proposed site, would probably be

faster than the response time currently provided by the Lyman County Sheriff's Office. *Id.* The tribe also stated in its letter that a public meeting had been held with the "members of the Oacoma Board of Directors." *Id.*

H. Subsequent Actions

On August 10, 1990, the BIA Acting Area Director forwarded the documentation relative to the proposed trust acquisition to the office of the Assistant Secretary – Indian Affairs of the DOI. A.R. 19. The cover memorandum contained a brief outline of the documents being forwarded, but no real discussion of the elements of 25 C.F.R. § 151.10. *Id.* The BIA Acting Area Director requested approval of the tribe's request for trust status. *Id.*

On December 13, 1990, the Acting Assistant Secretary – Indian Affairs of the DOI issued a memorandum to the BIA Aberdeen Area Director approving the acceptance of the property into trust for the tribe. A.R. 28. The memorandum contained no discussion of the factors found in 25 C.F.R. § 151.10, but merely stated the conclusion that the acquisition was consistent with applicable guidelines and would be in the best interests of the tribe. *Id.*

On November 30, 1992, the land in question was transferred to the United States of America in trust for the Lower Brule Sioux Tribe.

DISCUSSION

A. Subject Matter Jurisdiction

Section 5 of the Indian Reorganization Act, as amended, provides in pertinent part as follows:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> * * *
>
> Title to any lands or rights acquired pursuant to sections . . . 465 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The immediate question posed by plaintiffs' complaint is whether a decision of the Secretary of the Interior (Secretary) under 25 U.S.C. § 465 is subject to judicial review.

Defendants urge in their motion to dismiss that decisions of the Secretary under section 465 are not subject to judicial review because such decisions are wholly committed to the Secretary's discretion. The Administrative Procedure Act (APA) provides for judicial review of federal agency action where only non-monetary relief is requested so long as the agency decision in question is not "committed to agency discretion by law." *See* 5 U.S.C. §§ 701(a)(2), 702. However, the Court raises *sua sponte* another issue related directly to this Court's subject matter jurisdiction.

It is axiomatic that the United States' sovereign immunity protects it from lawsuits except where the federal government has expressly waived that immunity. Furthermore, waivers of sovereign immunity are strictly construed against the party seeking to sue the sovereign. At least one court has found, based on an analysis of the Quiet Title Act (QTA), 28 U.S.C. § 2409a, that the United States did not intend to waive its sovereign immunity as to actions like the one brought herein by the state of South Dakota and the city of Oacoma. *See Florida Dep't of Business Regulation v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186, 89 L. Ed. 2d 302 (1986).

In *Florida Department of Business Regulation*, the Eleventh Circuit was asked to review a decision of the Secretary pursuant to section 465 in which land outside a reservation was taken into trust for the Seminole Indian Tribe. *Id.* at 1250. The plaintiffs were political subdivisions of the state of Florida who challenged the Secretary's decision, but did not themselves claim any property interest in the land at issue. *Id.* at 1250, 1254.

The Eleventh Circuit noted that the APA waives sovereign immunity for review of administrative action only to the extent that another statute does not expressly or impliedly forbid suit. *Id.* at 1253. The court observed that the QTA provided the exclusive means by which the United States' title to land could be challenged. *Id.* at 1254 (citing *Block v. Worth Dakota ex rel. Bd. of University & School Lands,* 461 U.S. 273, ___, 103 S. Ct. 1811, 1819, 75 L. Ed. 2d 840 (1983)). The court further noted that the QTA expressly prohibited challenges to United States' title to Indian trust lands. *Id.* at 1253-54.

The Eleventh Circuit recognized that, in the usual action to quiet title under the QTA, the plaintiffs assert an adverse property interest in the land while in this case, the state of Florida was not asserting any property interest in the trust land. *Id.* at 1254. However, the court stated that Congress's intent in excluding actions involving Indian trust lands from the QTA was to prevent third parties from interfering with the United States' trust relationship with Indians. *Id.* The lawsuit brought by Florida, if allowed to proceed, would disrupt the trust relationship between the United States and Indians to the same extent as if Florida were asserting a property interest in the trust land. *Id.* Therefore, the court concluded that to prevent circumvention of congressional intent behind the QTA, the court must not exercise jurisdiction to review decisions of the Secretary made pursuant to 25 U.S.C. § 465. *Id.*

The holding of *Florida Department of Business Regulation* dictates that this Court not review the Secretary's decision in this case. In this case, as in the Eleventh Circuit case, the plaintiffs are not asserting an adverse property interest in the trust land, but if allowed to proceed, the plaintiffs' suit would disrupt the United States' trust relationship with Indians, specifically with the Lower Brule Sioux Tribe. Were *Florida Department of Business Regulation* clearly the uniform federal law, the Court's discussion would end here. However, there is at least one other federal court which appears to be in conflict with the Eleventh Circuit.

In *Sault Saint Marie v. Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978), the district court was asked to review a decision of the Secretary made pursuant to section 465 taking land outside a reservation into trust for an Indian

tribe. The defendants argued that the United States was an indispensable party and that under the QTA, 28 U.S.C. § 2409a, the United States had not waived its sovereign immunity from suit. *Id.* at 469.

The district court recognized that the APA waives sovereign immunity to allow review of administrative action only if another statute does not expressly or impliedly forbid the lawsuit. *Id.* at 470. Unlike the Eleventh Circuit, however, the district court in *Andrus* concluded that the QTA did not impliedly forbid actions seeking judicial review of the Secretary's decisions under section 465. *Id.* at 471-72. The district court concluded that the QTA was enacted for very limited reasons and that Congress did not intend for the QTA to have application outside the narrow confines of that act. *Id.* Because the plaintiffs in *Andrus* were not asserting an adverse property interest in the land in question, their lawsuit did not fall within the parameters of the QTA. *Id.* Accordingly, the district court concluded that the QTA did not act to impliedly forbid plaintiffs' suit for judicial review of the Secretary's decision under section 465. *Id.*

Whether the Eighth Circuit would adopt the Eleventh Circuit's or the *Andrus* court's interpretation of the APA and QTA is somewhat unclear. In *Ducheneaux v. Secretary of the Interior*, 837 F.2d 340, 341 (8th Cir.), *cert. denied*, 486 U.S. 1055, 108 S. Ct. 2823, 100 L. Ed. 2d 923 (1988), a non-Indian woman brought a suit seeking judicial review of the Secretary's decision that she was not entitled to half of her late Indian husband's trust lands. The Eighth Circuit held that the QTA prohibited federal courts from assuming jurisdiction over the suit because it was a lawsuit which challenged the United States' title to land held in trust for an Indian. *Id.* at 342-44. The *Ducheneaux*

court quoted at length and approvingly from the Eleventh Circuit's decision in *Florida Department of Business Regulation*. *Id.* at 343. However, *Ducheneaux* is not completely dispositive of the issue now facing this Court because the plaintiff in *Ducheneaux* was asserting an adverse property interest in the land held by the United States. *Id.* at 341. Thus, *Ducheneaux* fell squarely within the provisions of the QTA while the plaintiffs' claims in this case do not.

In *Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir. 1978), the facts were much more analogous to this case in that defendants therein (the parties challenging the Secretary's decision), were not asserting a property interest in the land that had been taken into trust. Although the *Chase* court did not discuss the issue of the court's jurisdiction under the APA and QTA, the court nevertheless exercised its jurisdiction to decide the issue of whether the Secretary had abused its discretion in taking certain land into trust pursuant to section 465. *Id.*

Neither *Chase* nor *Ducheneaux* directly determine the issue of whether the QTA impliedly forbids suits under the APA when plaintiffs, who do *not* claim a property interest in land, seek review of a decision of the Secretary to take land into trust for Indians pursuant to 25 U.S.C. § 465. The Court finds the Eleventh Circuit's rationale in *Florida Department of Business Regulation* more persuasive than that expressed by the district court in *Andrus*. Furthermore, the *Ducheneaux* court's discussion of *Florida Department of Business Regulation* convinces this Court that the Eighth Circuit finds that rationale persuasive also. Accordingly, the Court finds that it has no jurisdiction to review the Secretary's decision and plaintiffs' complaint must be dismissed.

B. Constitutional Claims

Review of the Secretary's decision under the APA would have involved an inquiry into whether the Secretary's decision was arbitrary and capricious and whether the Secretary abided by its own regulations. These areas of inquiry are barred by the QTA, as discussed above. However, plaintiffs also challenge the very constitutionality of 25 U.S.C. 465. This issue presents a federal question over which this Court can, and will assert jurisdiction. *See* 28 U.S.C. § 1331.

Plaintiffs challenge the constitutionality of section 465 both facially and as applied to the trust acquisition in this case. Plaintiffs' first argument concerning the facial validity of the statute is that "[a]ny taking of land into trust off the reservation is beyond the power of Congress." Plaintiff's Amended Complaint, Cause of Action ¶ IV. However, Congress's power over Indians and Indian tribes is plenary and certainly entails the power to take land into trust on behalf of Indian tribes, even when that land lies outside the exterior boundaries of a particular tribe's reservation. U.S. Const. art. I, § 8, cl. 3; and *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599-600 (1906) (stating that Congress has plenary power over Indians). *See also New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992) (stating that if the Constitution confers on congress authority over a certain subject, then "the Tenth Amendment expressly disclaims any reservation of that power to the States"); *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513, 528, 56 S. Ct. 892, 895, 80 L. Ed. 1309 (1936) (stating that, although states have the power to tax and borrow, the federal government

may control or interfere with this power if the right to do so is conferred by the Constitution).

Plaintiffs' next argument presents an as-applied challenge to the statute. Plaintiffs assert that the taking of land into trust in this case was not supported by a rational purpose and, therefore, violates the tenth amendment to the United States Constitution. Plaintiffs' Amended Complaint, Cause of Action ¶ IV. Plaintiffs argue that the taking of land into trust in this case was not supported by a rational purpose because the Lower Brule Sioux Tribe had not proposed an actual intended use for the property. *Id.* Without such a proposed use being tendered to the Secretary, the plaintiffs argue that the Secretary's action could not have been supported by a rational purpose. *Id.*

Plaintiffs' argument ignores the state of the administrative record before this Court. On March 30, 1990, the Chairman of the Lower Brule Sioux Tribe sent a letter to the BIA asking that the land in question be taken into trust. A.R. 17, Exhibit. In that letter, the Chairman stated that the tribe intended to use the land to create an industrial park to which the tribe would try to attract businesses. *Id.* The tribe proposed to negotiate with these businesses preferential employment provisions for Native Americans and thereby provide increased economic benefit for the tribe and surrounding communities. *Id.* This certainly provides the Secretary with a rational basis for its decision so that the taking in question does not violate the tenth amendment.

Plaintiffs make much of the fact that the tribe initially thought the Samsonite company would relocate to the proposed site. When the Samsonite company put its plans to move to the site on hold, plaintiffs seem to suggest that

this somehow negated the tribe's intended use for the land. This is simply not the case. Although it is true that the tribe anticipated that the Samsonite company would set up a plant at the proposed site, the tribe's letter to the Secretary asking that the land be taken into trust does not mention the Samsonite plant. A.R. 17, Exhibit. Instead, the letter merely states a general purpose of creating an industrial park, which could be accomplished with any number of businesses aside from Samsonite. *Id.* The tribe's general proposed purpose for the land constitutes a rational purpose justifying the Secretary's decision.

Of course, the gravamen of plaintiffs' claim is the allegation that the tribe intended from the beginning to use the land not for an industrial park, but for gambling, and that the Secretary knew of this hidden purpose. The only support in the administrative record for plaintiffs' theory is the letter from plaintiff state of South Dakota to the BIA in which it asserted that "some" had suggested that the tribe would use the land, to build a gambling casino. A.R. 22, Exhibit 15. This does not substantiate the plaintiffs' claims that the tribe's true hidden purpose for the land was to conduct gaming thereon and that the Secretary knew this, but turned a "blind eye" to the tribe's machinations. Furthermore, the Secretary may take land into trust even when the tribe intends to use the land for gaming, although different regulations govern such acquisitions. Plaintiffs have failed to carry their burden of demonstrating a violation of the tenth amendment.

Plaintiffs also assert a claim that "25 U.S.C. § 465 constitutes an unlawful delegation of legislative power from Congress to the Executive Branch and therefore acquisition of land under this statute *in this case* was unlawful and unconstitutional." Plaintiffs' Amended

Complaint, Cause of Action ¶ VI (emphasis added). Although the emphasized language would seem to indicate that this is an as-applied challenge, plaintiffs' claim is better characterized as a facial challenge to the statute. This is because plaintiffs argue that the delegation contained in section 465 is so broad and standardless that it is impossible to asertain in any given case whether the Secretary has obeyed the will of Congress. See Plaintiffs' Amended Complaint ¶ XVI.

Congressional delegation of legislative power to another branch of government is valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States,* 488 U.S. 361, 372-73, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S. Ct. 133, 142, 91 L. Ed. 2d 103 (1946)). Prior to 1935, the United States Supreme Court never found a congressional delegation to be unconstitutional. *Id.* at 373, 109 S. Ct. at 655. Then, in 1935, the Court invalidated two statutes as excessive delegations. *Id.* (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct, 837, 79 L. Ed. 1570 (1935); and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 466 (1935)). Following *Schechter* and *Panama Refining*, the Court again has failed to find any congressional delegation, some of which have been very broad, to be excessive. *Id.* As discussed below, it is clear that section 465 is also constitutional under the nondelegation doctrine.

From the mid- to late 1800s until 1934, Congress pursued an allottment [sic] policy with regard to Indians. This policy sought the assimilation of Indians into mainstream society and the eventual destruction of Indian

society. Congress attempted to accomplish this mission by allotting Indian reservation land to individual Indians and then allowing those Indians to sell their allotments after a brief trust period. So-called surplus reservation lands were often sold outright to non-Indians without any intervening allottment [sic] trust period. The allotment policy was a failure.

In 1934, congressional policy toward Indians changed abruptly with the passage of the Indian Reorganization Act of 1934 (IRA), of which 25 U.S.C. § 465 is a part. *See* 25 U.S.C. §§ 461-479. The IRA discontinued the further allottment [sic] of Indian lands, extended indefinitely the period of trust on allotted land for which the trust period had yet to expire, and authorized the Secretary of the Interior to acquire further land to be held in trust for Indian tribes or individual Indians. *See* 25 U.S.C. §§ 462-63, 465. The purpose of the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, 73d Cong., 2d Sess., 1 (1934).

In section 465, Congress has clearly identified the public agency to which power is being delegated: the Secretary of the Interior. Furthermore, the context in which section 465 was passed clearly delineates the general policy to be applied and the bounds of that delegated authority. *See Mistretta*, 488 U.S. at 372-73, 109 S. Ct. at 655. That is, the Secretary is to acquire land for Indians to help reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more self-sufficient, both economically and otherwise. Therefore, the Court finds that section 465 does not represent an unconstitutional delegation of legislative power to the executive branch of government.

CONCLUSION

The Administrative Procedure Act (APA) waives the sovereign immunity of the United States to allow judicial review of administrative action where the relief requested is non-monetary. 5 U.S.C. § 702. However, this waiver of sovereign immunity is limited. The APA does not waive the sovereign immunity of the United States where another statute expressly or impliedly forbids the relief sought. *Id.* The Court finds that the Quiet Title Act (QTA), 28 U.S.C. § 2409a, specifically the QTA's prohibition on bringing suit to challenge the United State's title to Indian trust lands, impliedly forbids plaintiffs' suit under the ADA. The Court also finds that 25 U.S.C. § 465 is constitutional both on its face and as applied in this case. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss (Docket No. 31) is granted.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment (Docket No. 36) is denied.

IT IS FURTHER ORDERED that defendants' motion to strike (Docket No. 52) and plaintiffs' motion regarding defendants' response to statement of facts (Docket No. 56) are both denied as moot.

Dated this 1st day of April, 1994.

BY THE COURT:

/s/ Richard H. Battey
RICHARD H. BATTEY
UNITED STATES
DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: /s/ Alice R. Raesly
Deputy Clerk

(SEAL)

Memorandum JAN 1[8, 2001]

To: Deputy Commissioner of Indian Affairs

From: [Illegible] Assistant Secretary – Indian Affairs Michael Anderson

Subject: Ratification of Decision dated April 6, 2000 to take approximately 91 acres of land located in Lyman County, South Dakoka [sic] in trust for the Lower Brule Sioux Tribe of Indians of South Dakota ("Tribe")

I have reviewed your memorandum dated January 18, 2001, and attachments recommending that the decision of the Assistant Secretary – Indian Affairs dated April 6, 2000, to take approximately 91 acres into trust for the Tribe be ratified. Notice of the April 6, 2000, decision was published in the *Federal Register* on May 18, 2000. The April 2000 decision approved the Tribe's request for the Secretary to take the parcel into trust for economic development purposes. I note that the Bureau's memorandum of April 6, 2000, states that the Tribe proposes to use a portion of the parcel for the development of the Native American Scenic Byway. In the event the Tribe should decide to engage in other types of economic development activities on the property, the Tribe will need to comply with all applicable federal laws and regulations, *e.g.*, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*

Based on the recommendations contained in the Bureau's memorandum of January 18, 2001, I hereby ratify the decision dated April 6, 2000, to acquire 90.94 acres of land, more or less, in trust for the Tribe. This ratification decision incorporates the complete record of decision supporting the decision of April 6, 2000, as well as the Environmental Assessment and Finding of No Significant

Impact issued on December 14, 2000, into the administrative record for this acquisition.

Please publish this decision to ratify the decision of April 6, 2000 in the *Federal Register*.

cc: Secretary's Surname, Secretary's Reading File (2):SOL 220 Surname, 220 Chron. 200 RF:101A:Bureau RF:600 LEScrivner01/18/01 k:\shared\realty\Jonathan\Ltr-Memo\mikedec.wpd

Jan 18 2001

Memorandum

To: Assistant Secretary – Indian Affairs

Through: Deputy Commissioner of Indian Affairs
[Illegible] Sharon Blackwell

From: Director, Office of Trust Responsibilities
/sgd Terrance L. Virden

Subject: Ratification of April 6, 2000, decision to transfer approximately 91 acres of land into trust for the Lower Brule Sioux Tribe

Background

On April 6, 2000, the Bureau of Indian Affairs' (Bureau) submitted a recommendation in a memorandum to the Assistant Secretary – Indian Affairs (AS-IA) from the Director, Office of Trust Responsibilities, through the Deputy Commissioner of Indian Affairs, recommending that the AS-IA approve the Lower Brule Sioux Tribe's application to take approximately 91 acres of land in Lyman County, South Dakota into trust (*attached*). The memorandum analyzed the various 25 C.F.R. Part 151 factors to determine if the acquisition met all the requirements of Part 151. At the time of the decision, the Tribe had preliminary plans to develop a Native American Scenic Byway on a portion of the parcel but had not secured adequate funding to begin the development. In addition, the Tribe had submitted a resolution as part of its application that stated there would be no change in the current land use at the present time. In analyzing whether the acquisition complied with the National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321 *et. seq.*, the Bureau concluded that the acquisition qualified as a categorical exclusion, "where no development, physical alteration, or change of land use after acquisition is known

or planned," since the Tribe's plans for development were still preliminary. On April 6, 2000, the AS-IA reviewed the Bureau's memorandum and determined that the acquisition was in the best interest of the Tribe (*attached*). On May 18, 2000, the Department published in the Federal Register a Notice of Intent to Take into Trust approximately 91 acres of land in Lyman County, South Dakota, for the Lower Brule Sioux Tribe. 65 FR 31594 (2000).

On June 16, 2000, the State of South Dakota, City of Oacoma, and Lyman County sued the Department in district court of South Dakota, Central Division, over its decision to accept the parcel into trust. On August 11, 2000, the Utah district court issued a decision in *Shivwits Band of Paiute Indians v. State of Utah*, No. 2: 95 CIV1025C (D. Utah 2000) (*attached*). In that case, the court found that the Bureau's failure to prepare an environmental assessment in connection with the acquisition of a parcel of land for the Shivwits Band of Paiute Indians violated the procedural requirements of the National Environmental Policy Act (NEPA). The Utah court's decision caused the Bureau to question whether it had appropriately applied NEPA in the processing of the Lower Brule Sioux's application. The Bureau requested a stay from the South Dakota district court to review its NEPA compliance in light of the *Shivwits* decision and the court granted the government a stay until January 18, 2001, to answer the plaintiffs' complaint.

EA Process and History

After an examination of the *Shivwits* decision, the Bureau decided to conduct an environmental assessment (EA) on the Lower Brule Sioux Tribe's trust acquisition, in the

event that an EA was determined necessary. On September 26, 2000, the Bureau issued a Requisition and Statement of Work (*attached*) engaging the services of HDR Engineering (HDR) of Minneapolis, Minnesota, to prepare an EA on behalf of the Bureau. The statement of work required HDR to complete an EA for the proposed trust acquisition for the Lower Brule Sioux Tribe of certain lands in Lyman County, South Dakota, and for the construction of a Native American Scenic Byway Information Center on those lands. HDR was selected on the basis of its having done prior research relating to the land in question. HDR met an October 30, 2000, deadline for submitting a draft EA (though the date printed on the draft was November 2000) to the Office of Trust Responsibilities at the Bureau's Central Office. During the month of November 2000, Bureau staff members reviewed and edited the draft EA and sent it back to HDR for finalization. HDR completed a final EA (*attached*) early in December 2000, which the Bureau approved.

After approval of the EA, the Bureau drafted and forwarded a Finding of No Significant Impact (FONSI) for signature by the Deputy Commissioner of Indian Affairs. On December 14, 2000, the Acting Deputy Commissioner signed the FONSI. Also on December 14, 2000, the Acting Deputy Commissioner signed a Notice of Availability of the EA and FONSI (*attached*). The same day, in compliance with the regulations and with the Bureau's NEPA policy, the Bureau telefaxed the Notice of Availability to its Lower Brule Agency, where it was immediately posted. The Notice of Availability was also posted on that date at the tribal office of the Lower Brule Sioux Tribe. The Notice of Availability was published December 21, 2000, in *The Chamberlain-Oacoma Register* weekly newspaper. In

addition to the Notice of Availability and publication in the newspaper, the Bureau's Central Office mailed individual copies of the EA to Steven R. Smith, attorney for the city of Oacoma, John P. Guhin, Deputy Attorney General for the State of South Dakota, and Paul E. Jensen, attorney representing Lyman County. The Bureau's Lower Brule Agency sent copies of the EA and FONSI to the Lower Brule Sioux Tribe, to Marshall Matz and Julian Brown, attorneys representing the Tribe and to the Native American Rights Fund.

The posted and published Notice of Availability announced that copies of the EA could be reviewed at, or obtained from the Bureau's Office of Trust Responsibilities, Central Office, Washington. D.C., or the Bureau's Lower Brule Agency in Lower Brule, South Dakota. More than 30 days have elapsed since the Notice of Availability was posted, with no requests for copies of the EA received by the Bureau. In addition, no comments on the EA or the FONSI have been submitted to the Bureau at either location.

NEPA Analysis

The Department's May 18, 2000, decision relied on the Bureau's recommendation that no NEPA analysis was required for the acquisition of the land into trust because no development or change of land use after acquisition was known or planned, and that therefore, the acquisition was categorically excluded from NEPA review. This determination was made because, while the Tribe anticipated that is [sic] would potentially use a portion of the parcel as part of the Native American Scenic Byway, that development was dependent upon the Tribe being able to secure the necessary funding for the projected Byway plans. At the time

the decision was issued, the Tribe had not secured funding to begin development of the Byway. The May decision also anticipated that once the Tribe, secured funding, an EA would be prepared for the Byway project. Given the questions presented by the *Shivwits* decision in Utah, however, the Bureau, fully sensitive to environmental concerns, proceeded with caution and contracted with HDR for the completion of an EA.

The EA and subsequent FONSI conclude that when the development of the Native American Scenic Byway takes place, that development will not have a significant impact on the environment. The additional environmental review conducted by the Bureau assures that no environmental harm will result from the acquisition of this parcel into trust nor will there be any environmental harm as a result of any future development of the Native American Scenic Byway Information Center.

The Bureau recommends, based on the *Shivwits* case, that the recently completed EA and FONSI be incorporated into the record of decision on this proposed trust acquisition for the Lower Brule Sioux Tribe. Further, the Bureau recommends that you concur in the FONSI, dated December 14, 2000, finding that the acquisition of the parcel into trust and the subsequent development of the Native American Scenic Byway will have no significant impact on the environment. This course of action appears to be in the best interest of the Tribe and will help assure the surrounding community that the acquisition of this property into trust will cause no foreseeable environmental harm.

The Bureau further recommends that you issue a ratification decision which incorporates the entire record of decision supporting the May 18, 2000, decision. incorporates the

December 14, 2000, EA and FONSI and based on all of this information, reaffirm the Bureau's decision to take land into trust for the Lower Brule Sioux Tribe.

Should you agree with these recommendations, attached is a decision document concurring in the FONSI dated December 14, 20000, and in light of the FONSI, a decision that ratifies the May 18, 2000, decision to accept approximately 91 acres of land into trust for the Lower Brule Sioux Tribe.

Attachments

cc: 220 Surname, 220 Chron, 200 RF:101A:Bureau RF:SOL LEScrivner K:\REALTY\JONATHAN\LTR-MEMO\ Eadec1-1.wpd

[SEAL] United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

April 6, [2000]

Memorandum

To: Great Plains Regional Director

From: Assistant Secretary – Indian Affairs /s/ Kevin Gover

Subject: Request for Off-Reservation Fee-to-Trust Acquisition by the Lower Brule Sioux Tribe of South Dakota for 90.94 Acres in Lyman County, South Dakota

We have reviewed your memorandums of June 30, 1999, and February 18, 2000, and the attached documentation regarding the subject fee-to-trust acquisition. Your request was submitted to this office pursuant to Central Office memorandums dated May 26, 1994, and June 22, 1999.

We have determined the proposed acquisition is consistent with applicable guidelines and would be in the best interest of the Lower Brule Sioux Tribe of South Dakota. Therefore, we will publish the notice of intent to take the land into trust in the Federal Register and notify you of the date of publication. You are authorized to proceed with the acceptance for approval of the subject property to the United States of America in trust for the Lower Brule Sioux Tribe of South Dakota, subject to the receipt of satisfactory title evidence in accordance with 25 CFR 151.13 and other applicable guidelines. In the event the use of the property changes, the change will be subject to the completion of NEPA compliance.

cc: Superintendent, Lower Brule Agency

United States Department of the Interior

[SEAL] BUREAU OF INDIAN AFFAIRS [LOGO]
Washington, D.C. 20240

Apr. 6 , 2000

Memorandum

To: Assistant Secretary – Indian Affairs

Through: Deputy Commissioner of Indian Affairs
/s/ Hilda A. Manuel

From: Director, Office of Trust Responsibilities
/s/ Terrance L. Virden

Subject: Request by the Lower Brule Sioux Tribe for Off-Reservation Fee-to-Trust Acquisition of Approximately 91 Acres of Land in Oacoma, South Dakota

BACKGROUND:

In 1990, the tribe purchased 90.94 acres of land known as the "Oacoma property" from Mrs. Wanda F. Cummings. By letter dated March 30, 1990, the tribe requested the property be conveyed to trust status for economic development. The Great Plains Regional Director (formerly the Aberdeen Area Director) submitted the application to Central Office for review and recommended approval on August 10, 1990. The Preliminary Title Opinion (PTO) was issued September 17, 1990, listing any encumbrances to the title.

On December 13, 1990, the Assistant Secretary authorized the Aberdeen Area Director to approve the subject conveyance to the United States in trust for the Lower Brule Sioux Tribe, subject to the receipt of satisfactory title

evidence. A decision letter was issued by the Aberdeen Area Director on March 22, 1991, stating that the property would be accepted into trust upon satisfactory elimination of the objections listed in the PTO. The acquisition was approved on November 30, 1992.

The decision was appealed in July 1992 by the State of South Dakota and the City of Oacoma in the United States District Court, South Dakota. On April 1, 1994, the District Court granted the Department of Interior's Motion to Dismiss the case. The local governments appealed that ruling to the Eighth circuit. That Court declared 25 U.S.C. § 465 unconstitutional. The Solicitor General filed a Petition for a Writ of Certiorari asking the U.S. Supreme Court to vacate the Eighth Circuit's decision. On October 15, 1996, the U.S. Supreme Court vacated the judgement and instructed the Eighth Circuit to vacate the judgement of the District Court and remand the case to the Secretary of the Interior for reconsideration of his administrative decision. The Department of the Interior published a notice in the Federal Register declaring that as of December 24, 1996, when jurisdiction returned to the Secretary, the property was no longer held in trust, (Fed. Reg. Vol.62, no. 93, Pages 26551 and 26552, dated Wednesday, May 14, 1997.)

Because the case was remanded to the Secretary of the Interior for reconsideration, Central office Bureau of Indian Affairs's memorandums dated May 26, 1994, and June 22, 1999, requested that the application for reconsideration be forwarded to Central Office for review and issuance of a decision.

On August 14, 1997, the tribe passed Resolution 97-408 asking that the application be reconsidered, however, the

planned use of the property had changed from the original application. Tribal Resolution 97-487 was passed on September 25, 1997 which provided the legal description of the Oacoma property and identified the new purpose for the land acquisition as "(a) to enhance the economic development of the tribe, and (b) to provide a nexus to the Oacoma area which is of historical importance to the Tribe."

The Great Plains Regional Director submitted the application to Central Office by memo dated June 30, 1999, recommending approval. The February 18, 2000, memorandum providing recommendations and addressing the factors for off-reservation fee-to-trust acquisitions pursuant to 25 CFR 151, was also reviewed.

DESCRIPTION OF PROPERTY:

> A portion of the Northeast Quarter of the Northwest Quarter (NE¼NW¼) lying North of Highway No. 6 (shown as Lot H-1 in Book 3 of Plats, page 108) and except Lot "A" of Lester's Addition (a subdivision of the NE¼NW¼) of Section Twenty-four (24) and the West Half of the Southwest Quarter (W½SW¼) of Section Thirteen (13), the Northwest Quarter of the Northwest Quarter of the Northwest Quarter (NW¼NW¼NW¼) of Section Twenty-four (24), and Northeast Quarter of the Northwest Quarter of the Northwest Quarter (NE¼NW¼NW¼) of Section Twenty-four(24), Township One Hundred Four North (104N), Range Seventy-two West (72W) of the fifth Principal Meridian, Lyman County, South Dakota

The property is located within the municipal limits of Oacoma, South Dakota, approximately eight miles south of

the current Lower Brule Sioux Indian Reservation. Subject property (Oacoma) is adjacent to Highway No. 16 and within the tribe's former reservation boundaries.

Topography of the Oacoma land contains soil types of approximately 95% Opal-sansarc clays and 5% Lowry silt loams. The Opal-sansarc clays are uplands characterized by steep slopes that are unsuited for cultivated crops and haylands. These uplands are more suited to livestock grazing. The Lowry soils are uplands characterized by long, smooth, slopes. The slopes can range from nearly level to moderately sloping. These soils are unsuited for cultivated crops and tarne pasture. In its undisturbed state, this land is primarily suited for livestock grazing.

ANALYSIS OF FACTORS TO BE CONSIDERED WHEN PROCESSING AN ACQUISITION:

The tribe's request is made pursuant to the August 14, 1997, Lower Brule Sioux Tribal Council Resolution No. 97-408 and Tribal Resolution 97-487 passed on September 25, 1997.

The Lyman County Commissioners and the Governor of South Dakota were notified of the proposed trust acquisition by the Lower Brule Tribe by certified letters on January 15, 1998. However, the January 15, 1998, notice failed to state the intended use of the property to be acquired by the Lower Brule Sioux Tribe. By letter of February 12, 1998, the Superintendent of the Lower Brule Agency rescinded the January 15, 1998, notice letter and renotified the Lyman County Commissioners, and the Governor of South Dakota and provided the first notice to the City of Oacoma.

Comments opposing the acquisition were received by the Lower Brule Agency on March 16, 1998, from the Office of Attorney General for the State of South Dakota and Andrea Law Offices representing the Town of Oacoma and Lyman County. The May 5, 1999, Lower Brule Sioux Tribal Council Resolution No. 99-299 stated that there will be no immediate change in land use of the Oacoma land and if there is a change, an Environmental Assessment dealing with construction will be done.

151.10(a) The existence of statutory authority for the acquisition and any limitations contained in such authority.

The Lower Brule Sioux Tribe of South Dakota is eligible to receive services from the United States. Therefore, the statutory authority for the Secretary of the Interior to acquire land in trust for the Lower Brule Sioux Tribe of South Dakota is Section 5 of the IRA (48 Stat. § 985; 25 U.S.C. § 465).

The Lower Brule Sioux Tribe is a Federally recognized tribe chartered under Section 17 of the Indian Reorganization Act (IRA) of June 18, 1934 (48 Stat. § 988; 25 U.S.C. § 477). Its constitution was ratified on July 11, 1936, and its By-laws were approved in 1960. The six-member Tribal Council is authorized to conduct tribal business according to the tribe's constitution and By-laws.

Section 5 of the IRA authorizes the Secretary of the Interior, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, for the purpose of

providing land for Indians. Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired and shall be exempt from state and local taxation, 25 U.S.C. § 465.

The regulatory authority to acquire land is set out at 25 CFR 151.3(a)(3). The Secretary is authorized to acquire land if he determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. One of the uses proposed by the tribe, its participation in the Native American Scenic Byway, will promote economic development for the tribe.

151.10(b) The need of the individual Indian or the tribe for additional land.

The Lower Brule Sioux Tribe states that in order to establish economic base, land is needed to diversify the tribe's economic development, expand their trust land base, and to generate much needed income for the Lower Brule Sioux Tribe for use in providing services to tribal members.

The Lower Brule Sioux Indian Reservation at one time was much larger, covering an area from the Missouri River on the east, to the White River on the south, west of Highway 83 and north almost to Fort Pierre. However, through treaties and executive orders it was greatly diminished. It now contains approximately 138,916 acres of land in Lyman and Stanley counties near the center of South Dakota. The town of Lower Brule is approximately 75 miles southeast of Pierre, the state capital. With a resident population base of only 1,200 people, the reservation is not

able to sustain its own economy. Current figures on unemployment for the tribe's reservation show that, as of February 1998, 40% of the adult members residing on the reservation are presently unemployed and over one-quarter of the tribe's residents have incomes below the poverty level. There are not enough businesses to employ everyone.

Topography of the reservation ranges from steep, rough river breaks near the Missouri River to rolling hills and prairie land elsewhere. Approximately 27,137 acres are considered waste, i.e., (badlands, wetlands, rights-of-way, etc.)

Approximately thirty percent of the land within the present boundaries is non-Indian owned. This land supports some 18 non-Indian farm-ranch operations. The tribe's economy is currently based almost exclusively on agriculture and on government grants and contracts. Several of Lower Brule's enrolled members are very interested in starting their own agricultural or livestock operations but there is no trust property available to support additional businesses within the boundaries of the reservation.

In order for the Lower Brule to develop a viable local economy it must be able to attract and establish various types of businesses. The location of the land, adjacent to Interstate No. 90, makes it more attractive to business and would enhance the tribes economic rehabilitation and support self-sufficiency. The tribe plans to generate income for its present members and future generations by purchasing any lands that are available within the boundaries or surrounding the Lower Brule Reservation.

The primary purposes of the IRA was to provide tribes with an avenue to expand their land bases for economic development and for self-determination. It was also the intent of the IRA to strengthen tribal governments to better facilitate tribal economic development.

151.10(c) The purposes for which the land will be used.

The original application stated that the land would be used for economic development (industrial park). The August 14, 1997, Resolution 97-408 requested that the application be reconsidered however, the planned use of the property had changed from the original application. Tribal Resolution 97-487 states that the land would be used "(a) to enhance the economic development of the tribe, and (b) to provide a nexus to the Oacoma area which is of historical importance to the Tribe." To supplement the previously described resolutions, the tribe submitted a business plan for the Oacoma land. This business plan states that the property will be used for the Native American Scenic Byway. The Scenic Byway is a cooperative effort between the communities of Oacoma, Chamberlain, the Crow Creek Sioux and the Lower Brule Sioux to attract visitors to their communities. The Scenic Byway Information Center and southern terminal entrance will be on the Oacoma land. The Visitor's Center will feature the "Circle of Tipis" project, which will represent the seven Sioux tribes located on reservations within South Dakota. At this point in time, the tribe has not secured funding to go forward with its plans for a Visitor's Center or the Circle of Tipi's. Until funding is secured, there will be no change in the land use.

Currently, the land is not being utilized and it is not being leased. The tribe does not have the necessary capital to begin any of its proposed development. Federal funding will be needed before any development will start. Since federal monies will be involved in any development that takes place on the property, NEPA compliance will be required at that stage. The tribe is aware that as part of the planning for the project, an Environmental Assessment (EA) will be required and it intends to complete an EA when project funding is available and prior to initiation of any activity to develop the land.

It is extremely difficult to attract businesses within a reservation that is isolated. By placing this land in trust status it would allow the tribe to contact private lenders that may be interested in establishing businesses. The location of the land near Interstate 90 would enhance the tribe's possibility of employment opportunities. Any development in the area will benefit not only the tribe but also the cities of Oacoma and Chamberlain.

151.10(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.

Letters were sent to the state and local governments on January 15, 1998, and February 12, 1998, inviting comments on the impact resulting from removing this property from the tax rolls. All the governments responded opposing the acquisition into trust. The main reasons for the opposition was the loss of tax revenue, jurisdiction, zoning, and the claim that the IRA is unconstitutional. However, by letter of December 15, 1998, the Honorable

William Janklow, Governor of the State of South Dakota, stated that: "Based upon their new business plan and the assurance that the Tribe will not conduct gaming at this location, we are pleased to support the Tribe's application for trust status." Several of the local businesses have also sent in letters of support, i.e. (1) Norwest Banks, Lower Brule and Chamberlain, (2) St. Joseph's Indian School, (3) The West Forty Amoco, Oacoma, (4) Marquette Bank, Chamberlain, (5) Al's Oasis, Inc., Chamberlin, and (6) Missouri River Corridor Action Team, Pierre, South Dakota.

The annual amount of taxes for the Oacoma property is approximately $2,587.02. Since there are no businesses (sales) on the property, the local governments are not receiving any sales tax revenue from the property. The only revenue the local governments receive from this property is the ad valorem tax assessed each year. The amount of property tax on the property is insignificant and will not have an adverse impact on the local governments.

151.10(f) Jurisdictional problems and potential conflicts of land use which may arise.

The tribe does not anticipate any jurisdictional problems or potential conflicts of land use. The tribe acquired 3,433.40 acres in 1995 west of the Lower Brule Reservation and have not encountered any jurisdictional problems with the local governments.

The Bureau of Indian Affairs will provide law enforcement services for the Oacoma property. The tribe early in the application process wanted to enter into an agreement with the city and county but the local governments were opposed to the fee to trust transaction and would not come

to any agreement. The tribe stated in its response to the opposition letters that it fully expects to pay for any services provided by the city.

151.10(h) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The Bureau of Indian Affairs is sufficiently staffed and equipped to accept the responsibilities of administering the Oacoma property for the Lower Brule Sioux Tribe. The BIA will provide administrative services and technical support in performing all real estate functions for the 90.94 acres. The Great Plains Regional Office also provides technical support to all agencies and Indian tribes within the region.

1510(h) the extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act (NEPA) Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

A Hazardous Materials Survey was completed on August 25, 1999, and approved October 12, 1999, indicating that no contaminants were found on the property. The regulations contained in NEPA have been addressed with a Categorical Exclusion Checklist completed on August 25, 1999, and approved on October 12, 1999, that indicates that the property qualifies as a categorical exclusion according to 516 DM 6, Appendix 4.4(I)3: "Lands acquired pursuant to 25 U.S.C. § 465, 35 U.S.C. § 501, and 25

U.S.C. § 2202 where no development, physical alteration, or change of land use after acquisition is known or planned." The application contained conflicting statements about the proposed uses of the land, however, since the tribe is unable to fund any of the proposed uses of the land at this time, it is not certain what development may occur or at what time. The Native American Scenic Byway requires the cooperation of many communities and is dependent on federal funding to succeed. Since federal funding will require environmental review of any project, compliance with NEPA will be completed once funding is secured and the project is going forward. In addition, the tribe has submitted a resolution stating that there would be no change in the current land use at this time.

151.11 Off-reservation acquisitions.

All the factors of this sub-part have been previously addressed in 151.10(a) through (c) and (e) through (h), except for § 151.11(c) which does not apply. Although the tribe submitted a business plan, we believe the plan is strictly speculative because it is based upon acquiring funding from a Federal agency which may not be granted.

In conclusion, we have determined that the acquisition is in the best interest of the Lower Brule Sioux Tribe of South Dakota and concur with the Great Plains Regional Director's recommendation that the acquisition be processed for approval. We also find that the acquisition qualifies for conversion to trust status pursuant to the provisions of the Act of June 18, 1934 (48 Stat. § 984, 25 U.S.C. § 465).

Attached is a memorandum to the Great Plains Regional Director advising her that the acquisition is consistent

with applicable guidelines and would be in the best interest of the Lower Brule Sioux Tribe of South Dakota. Therefore, we recommend approval of converting the subject property title to the United States of America in trust for the Lower Brule Sioux tribe of South Dakota, subject to the satisfaction of all title requirements pursuant to 25 CFR 151.13 and NEPA compliance.

Attachment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2309

State of South Dakota, et al.,	*	
	*	
Appellants,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
United States Department of the Interior, et al.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken and Judge Gruender would grant the petition for rehearing en banc.

(5128-010199)

February 6, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(3)

FILED

JUL 12 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1428

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
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QUESTION PRESENTED

Whether the provision of the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, that authorizes the Secretary of the Interior to take real property into trust "for the purpose of providing land for Indians," 25 U.S.C. 465, is an unconstitutional delegation of legislative power.

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In the Supreme Court of the United States

No. 05-1428

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 423 F.3d 790. The district court's opinion granting summary judgment in favor of respondents (Pet. App. 25-56) is reported at 314 F. Supp. 2d 935.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2005. A petition for rehearing was denied on February 6, 2006 (Pet. App. 138). The petition for a writ of certiorari was filed on May 8, 2006 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a policy of distributing Indians' tribal lands to individual Indians. See *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987). In addition, tribal lands that were deemed surplus were made available to settlement by non-Indians. See *ibid.* Other statutes of that era similarly provided for the allotment of land to individual Indians on particular reservations. See *id.* at 706-707; *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The allotment policy reduced Indian land holdings from 138 million acres in 1887 to 48 million acres in 1934, and led to a patchwork of ownership on Indian reservations. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); *Cohen's Handbook of Federal Indian Law* 1009 n.337 (Nell Jessup Newton et al. eds., 2005 ed.).

Congress repudiated the policy of allotment in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*).[1] In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2, 25 U.S.C. 462), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)), and prohibited any transfer of Indian lands (other than to the Tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian

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[1] The relevant provisions of the IRA, as they presently appear in the United States Code (as amended), are reproduced in an appendix hereto. App., *infra*, 1a-9a.

lands and for the benefit of cooperative organizations" (§ 4, 25 U.S.C. 464).

In addition, the IRA authorized or directed the Secretary to undertake specified steps aimed at improving the economic and social condition of Indians, including: acquiring real property "for the purpose of providing land for Indians" (IRA § 5, 25 U.S.C. 465); adopting regulations for forestry and livestock grazing on Indian units (§ 6, 25 U.S.C. 466); proclaiming new Indian reservations or adding to existing reservations with acquired lands (§ 7, 25 U.S.C. 467); assisting financially in the creation of Indian-chartered corporations (§ 9, 25 U.S.C. 469); making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of the Tribes (§ 10, 25 U.S.C. 470); paying tuition and other expenses for Indian students at vocational schools (§ 11, 25 U.S.C. 471); and giving preference to Indians for employment in positions relating to Indian affairs (§ 12, 25 U.S.C. 472).

Finally, the IRA included provisions designed to strengthen Indian self-government. Congress authorized Indian Tribes to adopt their own constitutions and bylaws (IRA § 16, 25 U.S.C. 476), to incorporate (§ 17, 25 U.S.C. 477), and to decide, by referendum, whether to opt out of the IRA's application (§ 18, 25 U.S.C. 478).

Petitioners challenge the constitutionality of Section 5 of the IRA. The full text of that Section is as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee

be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 465.

b. The Secretary adopted regulations in 1980 to implement his authority to acquire property under the IRA, which is carried out by the Bureau of Indian Affairs (BIA). See 25 C.F.R. Pt. 151; 45 Fed. Reg. 62,036 (1980). Those regulations set forth the land-acquisition

policy and specify the factors that guide the Secretary's evaluation of land acquisition requests. See 25 C.F.R. 151.3(a), 151.10. The regulations provide that, subject to consideration of the specified factors, land may be acquired in trust for Indians when it is within or adjacent to the Tribe's reservation or tribal land-consolidation area, the Tribe already owns the land, or the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(3). The factors the Secretary considers include "[t]he need of the individual Indian or the tribe for additional land" and "[t]he purposes for which the land will be used," as well as "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" and any other "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. 151.10(b), (c), (e) and (f).

The Secretary amended the land-acquisition regulations in 1995 and 1996. See 60 Fed. Reg. 32,874 (1995); 61 Fed. Reg. 18,082 (1996). The amended regulations retain the same statement of land-acquisition policy and the factors for reviewing an application that were identified in the 1980 regulations. In addition, the amended regulations require the BIA to give state and local governments notice of a proposed acquisition and an opportunity for comment. 25 C.F.R. 151.10, 151.11(d). If the land in question is neither within nor contiguous to a reservation, the Secretary will give increasing scrutiny to the Tribe's claim of anticipated benefits and increasing weight to any adverse impact of acquisition on the State or locality's regulatory jurisdiction or tax base as the distance of the property from the Tribe's reservation increases. 25 C.F.R. 151.11(b) and (d). Finally, the 1996 regulatory amendment provides a thirty-day period af-

ter publication of the Secretary's decision to take land into trust before title is actually acquired, 25 C.F.R. 151.12(b), so that an interested party may bring a judicial challenge to the acquisition.[2]

2. In 1990, the Lower Brule Sioux Tribe submitted a request to the BIA that the Secretary take into trust under Section 465 a 91-acre parcel of land owned by the Tribe. Pet. App. 2. The parcel at issue lies seven or eight miles south of the Lower Brule Sioux Reservation, adjacent to Interstate Highway 90 (I-90), and partially within the City of Oacoma, South Dakota. *Ibid.* The Tribe explained that it planned to use the land for an industrial park to develop businesses and employment opportunities for Native Americans. *Id.* at 101.

The BIA solicited comments on the Tribe's proposal from the State and the City of Oacoma. Both entities expressed concerns about the proposal, including possible problems regarding criminal and civil jurisdiction. Pet. App. 95-97, 101. The Tribe's reply contended that Oacoma did not presently provide government services to the property in question and that tribal police would be better able to respond to any incidents that might arise on the parcel than the single sheriff's deputy who was responsible for patrolling the entire county, including the City of Oacoma. *Id.* at 102-103. In December

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[2] Such a challenge would be barred by sovereign immunity after title is acquired, due to the exception for Indian lands in the Quiet Title Act (QTA), 28 U.S.C. 2409a. See, *e.g.*, *Neighbors for Rational Dev., Inc.* v. *Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004) (QTA barred APA action challenging Secretary's acquisition of land in trust under Section 465 as violating NEPA); *Alaska* v. *Babbitt*, 75 F.3d 449, 452-453 (9th Cir. 1995) (QTA barred APA claim that Bureau of Land Management's approval of Indian's allotment under 43 U.S.C. 270-1 to 270-3 (1970) (repealed 1971), was ultra vires), cert. denied, 519 U.S. 818 (1996).

1990, the Department of the Interior approved the Tribe's request and, in 1992, the land was conveyed to the United States in trust for the Tribe. *Id.* at 103.

3. The State of South Dakota and the City of Oacoma filed suit in the United States District Court for the District of South Dakota alleging that the Department of the Interior's approval of the Tribe's request was arbitrary and capricious and an abuse of discretion under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and that Section 465, which authorized the acquisition, was an unconstitutional delegation of legislative power.

The district court rejected these challenges. Pet. App. 94-115. The court held that it lacked jurisdiction over the State and City's APA claims in light of the prohibition in the Quiet Title Act (QTA), 28 U.S.C. 2409a, against challenges to the United States' title to Indian trust lands. Pet. App. 105-108. The court further held that the State and City's constitutional claims lacked merit. *Id.* at 109-11.

4. A divided panel of the Eighth Circuit reversed. Pet. App. 64-93 (*South Dakota* v. *Dep't of the Interior*, 69 F.3d 878 (1995)). The majority found that Congress had failed to set an "intelligible principle" to constrain the Secretary's exercise of authority under Section 465, and that it was therefore an unconstitutional delegation of legislative authority. Pet. App. 72. In so ruling, the majority noted that the Secretary had urged that his acquisition of land under Section 465 was not subject to judicial review at all. *Id.* at 74. Judge Murphy dissented. *Id.* at 78-93. She concluded that the historical context in which Section 465 was enacted, the other provisions of the IRA of which it was a part, and the IRA's legislative history all indicated that Section 465's pur-

pose is to provide land and economic opportunity for Indians to replace the millions of acres lost through the allotment process and that that purpose provides the Secretary with adequate direction. *Id.* at 83-85.

5. The Department of the Interior petitioned this Court for a writ of certiorari. At the same time, as noted above, see pp. 5-6, *supra*, in response to the Eighth Circuit's decision, the Department of the Interior amended its trust acquisition regulations to ensure the availability of judicial review of the Secretary's action on an application under Section 465 before land is actually taken into trust—*i.e.*, before judicial review is barred by sovereign immunity under the exception for Indian lands in the QTA. See 25 C.F.R. 151.12; 61 Fed. Reg. 18,082 (1996). The government's petition for a writ of certiorari suggested that the Court grant the petition, vacate the Eighth Circuit's decision, and remand the action to the Secretary for further proceedings under the new regulations.

The Court granted the petition, vacated the Eighth Circuit's judgment, and directed that the matter be remanded to the Secretary of the Interior for reconsideration of his administrative decision under Interior's amended trust acquisition regulations. See *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996) (Pet. App. 57-62); 62 Fed. Reg. 26,551-26,552 (1997) (explaining that the remand to the Department of the Interior operated to transfer the land out of trust).

6. Following remand, the Tribe submitted a renewed request in 1997 that the United States acquire the 91-acre parcel in trust status. Pet. App. 3. The Tribe's amended application explained that the purpose of the acquisition was to "enhance the economic development of the tribe and * * * to provide a nexus to the Oacoma

area which is of historical importance to the Tribe." *Id.* at 132.

The Tribe indicated that it intended to use the 91-acre parcel to attract I-90 tourist traffic onto South Dakota's Native American Scenic Byway. Pet. App. 132. The Tribe explained that it planned to build a "Circle of Tipis" comprised of seven tipis—each representing one of the South Dakota Sioux Tribes—and a visitor information and welcome center on the parcel for the Byway's southern terminal entrance. *Ibid.*

The Tribe further explained that acquisition of the property would help the Tribe achieve economic independence and benefit the surrounding localities and other Tribes. Pet. App. 131-132, 133. The Tribe noted that because of its small population and remote location, the Tribe's existing reservation was unable to sustain an economy. *Ibid.* As a consequence, over 40% of adult members residing on the reservation were unemployed, and over 25% of the residents had incomes below the poverty line. *Id.* at 131. The Tribe contended that acquisition in trust of the property along I-90 would allow the Tribe to attract business and employment opportunities for tribal members. *Id.* at 133.

The BIA notified the State, County and City of the Tribe's reapplication and requested their comments. Pet. App. 133. Each responded opposing the acquisition on the basis of lost tax revenue and jurisdictional conflicts, such as zoning, *ibid.*, although South Dakota's Governor later stated that he supported the application, as did various local entities, *id.* at 134.

The Assistant Secretary for Indian Affairs approved the application. Pet. App. 4; *id.* at 116-117. The agency determined that an analysis of the regulatory factors supported taking the land into trust to promote the eco-

nomic development of the Tribe. *Ibid.*; *id.* at 128-137. In response to the objections raised by the State and local governments, the Department found that the tax impact on local governments would be insignificant —$2587—and that a much larger trust acquisition for the Tribe a few years earlier had "not encountered any jurisdictional problems." *Id.* at 134.

7. The State, County and City filed suit challenging the acquisition decision under the APA and on constitutional grounds.[3] The district court rejected each of petitioners' challenges. The court reviewed the factors for taking land into trust, as outlined in the regulations, and determined that the Secretary had considered them adequately. Pet. App. 32-45. The court further held that Section 465 is not an unconstitutional delegation of legislative authority because, based upon a "plain reading of § 465" and "review of the historic context and legislative history of the IRA, Congress's 'general policy' supporting enactment of § 465 becomes apparent." *Id.* at 50.

8. The court of appeals affirmed. Pet. App. 1-24. The court observed that, in assessing petitioners' constitutional challenge, it must examine "the broader context of the Act to determine whether the delegation in 25 U.S.C. § 465 includes guidance sufficient to withstand a challenge based upon nondelegation doctrine grounds."

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[3] During the course of the district court litigation, the action was stayed temporarily to allow the Department of the Interior to re-examine its compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet. App. 119. After preparing an environmental assessment analyzing the impacts of the proposed acquisition, the Department determined that the acquisition was not likely to significantly impact the environment. *Id.* at 120. In January 2001, the Department ratified its earlier decision to acquire the land in trust status. *Id.* at 116-117.

Id. at 10. Examining the language and the context of the Act, the court determined that the purposes of Section 465 are made "evident in the whole of the IRA and its legislative history." *Id.* at 11. The court found that, reading the statute as a whole and in its historic context, "[t]he statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to" the Secretary in Section 465. *Id.* at 14.

The court of appeals also rejected the State's argument that the Secretary had failed to consider adequately the regulatory factors governing the exercise of his discretion. Pet. App. 15-22. The court found that the agency's finding that the property "would greatly enhance the Tribe's economic base and its ability to be self-sufficient, thereby serving the purposes of the IRA," was supported by the evidence, as was its finding that the adverse impact on local jurisdictions would be insignificant. *Id.* at 19. The court also found that the agency had considered adequately the issue of the property's distance from the Tribe's existing reservation when it found that "considering the circumstances of rural central South Dakota," the eight-mile distance is "of no great significance," because the location along I-90 "holds the greatest potential for the accomplishment of the Tribe's goals." *Id.* at 21-22.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore unwarranted.

1. Notably, petitioners do not contend that review by this Court is necessary to resolve a conflict among the courts of appeals. Rather, as petitioners concede (Pet. 14-15), each of the courts of appeals that has considered a constitutional challenge to Section 465 on nondelegation grounds has rejected that argument. See Pet. App. 6-14; *Utah* v. *Shivwits Band of Pauite Indians*, 428 F.3d 966, 972-974 (10th Cir. 2005), petition for cert. pending, No. 05-1160 (filed March 9, 2006); *Carcieri* v. *Norton*, No. 03-2647, 2005 WL 2216322, **8-**9 (1st Cir. Sept. 13, 2005); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 694, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).[4]

Nor is the issue presented one of urgent importance. To the contrary, the statutory provision that petitioners

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[4] The First Circuit panel's amended opinion in *Carcieri* was originally reported at 423 F.3d 45. Appellants filed a petition for rehearing en banc on November 7, 2005, which did not raise the nondelegation issue. The court thereafter requested that the opinion be withdrawn from the bound volume of the Federal Reporter. The editor's note at 423 F.3d at 46-72 makes clear, however, that the decision has not been vacated or withdrawn. To date, the court has taken no action on the petition for rehearing en banc. See No. 03-2647 Dkt.

Petitioners observe (Pet. 5-7) that a divided panel of the Eighth Circuit had, at an earlier stage of this litigation, upheld a nondelegation challenge to Section 465 (Pet. App. 64-93). This Court, however, vacated the panel's decision, and remanded the matter to the Secretary of the Interior to reconsider his administrative decision and to permit judicial review in light of newly amended regulations. *Id.* at 57-62. Accordingly, the initial panel decision has no precedential effect, see *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect."), and the court of appeals has itself repudiated its reasoning, see Pet. App. 9-14.

seek to have invalidated was enacted nearly 70 years ago, and since that time it has become embedded in the practical, day-to-day administration of Indian affairs. For seven decades, Section 465 has provided the primary mechanism for the federal government to restore and replace tribal lands, which Congress concluded was crucial to promote tribal self-government and economic self-sufficiency. See pp. 17-18, *infra*. Congress has, moreover, often revisited and amended the IRA, including subsequent to the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that are to guide his determinations.[5]

Similarly, this Court has considered Section 465 on numerous occasions and has remarked that "Section 465 provides the proper avenue" for a Tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005). See also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (noting that, in Section 465, Congress had granted the Secretary "authority to place land in trust, to be held by the Federal Government for the benefit of the Indians" and "explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt"); *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-159 (1973).

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[5] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465 to all Tribes).

The Court previously declined to grant review on the nondelegation issue in *Roberts*, which the court of appeals followed in this case (Pet. App. 11), and the same disposition is warranted in this case as well.

2. Despite the uniform appellate decisions upholding the constitutionality of Section 465, petitioners urge (Pet. 15) that the Court should grant a writ of certiorari to review the court of appeals' application of this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001). The court of appeals' application to a particular statute of well-settled principles regarding the conferral of authority on the Executive Branch does not warrant this Court's review. In any event, contrary to petitioners' contentions, the courts of appeals have carefully considered and correctly applied this Court's nondelegation precedent.

a. It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). Accord *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

Although "in 1935 [the Court] struck down two delegations for lack of an intelligible principle," the Court has "since upheld, without exception, delegations under

standards phrased in sweeping terms." *Loving* v. *United States*, 517 U.S. 748, 771 (1996); see, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding a statute authorizing the War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944) (upholding a statute authorizing the Price Administrator to set prices that are "generally fair and equitable and will effectuate the purposes of [the Emergency Price Control] Act"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding a statute authorizing the Federal Communications Commission to regulate broadcasting according to the "public interest, convenience, or necessity").

In *Whitman* itself, this Court reversed the court of appeals' determination that the Clean Air Act, 42 U.S.C. 7409(b)(1), unconstitutionally delegated Congress's legislative power to the Environmental Protection Agency to set national air quality standards. 531 U.S. at 472. The Court emphasized that "[i]n the history of the Court [it has] found the requisite 'intelligible principle' lacking in only two statutes," and that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting), and citing *id.* at 373 (majority opinion)). The Court noted that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and that in the two statutes struck down on nondelegation grounds, one "provided literally no guidance for the exercise of discretion," and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard

than stimulating the economy by assuring 'fair competition.'" *Id.* at 474, 475 (citing *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). The Court stressed that it had never required "that statutes provide a determinate criterion for saying how much of the regulated harm is too much." *Id.* at 475 (internal quotation marks and alteration omitted).

b. The courts of appeals have correctly (and uniformly) held that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust" to withstand constitutional challenge. Pet. App. 11.

Section 465 itself contains a number of express indications of Congress's policy. That section states that the purpose of the Secretary's land-acquisition authority is "providing land for Indians," which is a narrow group of individuals defined in 25 U.S.C. 479. See 25 U.S.C. 465. Section 465 provides a limited amount of federal funds to be used for the purpose and expressly forbids the use of those funds to acquire land for Navajo Indians outside of their established reservation boundaries. *Ibid.* Finally, Section 465 specifies that lands taken into trust "shall be exempt from State and local taxation." *Ibid.*

Moreover, whereas petitioners discuss solely Section 465 in isolation, that provision's context as part of the larger IRA is fundamental to understanding the scope of the Secretary's authority to take land into trust for Indians. The boundaries of the Secretary's authority under Section 465 "need not be tested in isolation," *American Power & Light*, 329 U.S. at 104, but may be discerned from the purposes of the IRA as a whole, its factual background, and the statutory context. *Ibid.*;

Lichter, 334 U.S. at 785; *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) (holding that the "public convenience, interest, or necessity [standard] * * * is to be interpreted by its context"); *Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947) (finding broad delegation to regulate banks "sufficiently explicit, against the background of custom, to be adequate").

Congress enacted the IRA to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe*, 411 U.S. at 152-154 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); accord *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (the IRA reflects Congress's "overriding goal of encouraging 'tribal self-sufficiency and economic development") (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)); *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress was particularly concerned with reversing the "disastrous" consequences of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the tribal land base and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 & n.5 (1994). Congress identified "conserv[ing] and develop[ing] Indian lands and resources" as one of the purposes of the IRA. Pmbl., 48 Stat. 984.

Accordingly, the IRA expressly repudiates the allotment policy, 25 U.S.C. 461, and contains several provisions designed to preserve and expand tribal lands. 25 U.S.C. 462, 463(a), 464, 465. Other provisions of the IRA likewise reflect Congress's policy of promoting the eco-

nomic development and self-governance of the Indian Tribes. 25 U.S.C. 469, 470, 471, 472, 476, 477. The Secretary's authority under Section 465 to acquire land in trust for Indians and the protection of that property against taxation is intended to further the larger statutory purposes, for example, by ensuring that tribal lands are not lost by condemnation, alienation, encroachment, or tax defaults. See generally *City of Sherrill*, 544 U.S. at 220-221 (recognizing that Section 465 serves as Congress's "mechanism for the acquisition of lands for tribal communities that takes account of the interest of others with stakes in the area's governance and well being" and "provides the proper avenue for * * * reestablish[ing] sovereign authority over territory" formerly held by an Indian Tribe).

The IRA's legislative history confirms the congressional purpose that is evident from the statutory text. As the court of appeals observed, the repeated references in the House and Senate Reports as well as floor debates to the goal of providing land to "Indian individuals and tribes whose land holdings are insufficient for self-support," Pet. App. 13 (quoting S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934)), reflect that "Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support," *id.* at 14.

The purposes of the IRA as reflected in its text, structure, context, and history provide the intelligible principles that guide the Secretary in the exercise of his authority under Section 465. The Secretary may acquire land "for the purpose of providing land for Indians," within the intent of Section 465, when the acquisition would serve such purposes as advancing tribal economic

development, assisting tribal self-governance, and restoring the ancestral tribal land base. Indeed, this Court has often identified those policies as the Congressional purposes that guide the Secretary's application of the IRA. See *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe*, 411 U.S. at 152 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, *supra*, at 6); see also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 168 (1980) (Brennan, J., concurring in part and dissenting in part) (noting that the IRA reflects both the "policy of encouraging tribal self-government" and the "complementary interest in stimulating Indian economic and commercial development").

Consistent with this long-established focus of the IRA, the Secretary has recognized that Section 465 does not confer boundless discretion. For example, in adopting a regulatory statement of land-acquisition policy under Section 465, the Secretary expressed his understanding that "[t]he policy * * * is within the scope of existing statutory authority and * * * reflects Congressional intent." 45 Fed. Reg. 62,035 (1980). The Secretary has, moreover identified through regulation the specific factors, derived from the purposes of the IRA and the Secretary's experience in administering it, that guide his decisions to take lands into trust for Tribes

and individual Indians. See 25 C.F.R. Pt. 151.[6] By setting out ascertainable standards that govern trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the limiting principles in the IRA. Cf. *Lichter*, 334 U.S. at 783 (recognizing that subsequent "administrative practices" under a statute may demonstrate the "*definitive adequacy*" of the terms of the statutory authorization).

c. Petitioners assert (Pet. 19) that, under this Court's decision in *Whitman*, "the nondelegation doctrine denies reliance on legislative history" for determining whether a statute sufficiently guides the exercise of the authority it delegates. *Whitman*'s reiteration that Congress must "lay down by legislative act an intelligible principle" does not, however, address in any way what reliance a court may give to legislative history in construing the text that Congress has enacted. *Whitman*, 531 U.S. at 472 (quoting *Hampton*, 276 U.S. at 409). And this Court has repeatedly made clear that a statute's purpose, factual background, and context are properly considered in determining whether a statute meets this test. See, *e.g.*, *American Power & Light*, 329

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[6] As discussed above, see pp. 4-5, *supra*, the regulations set forth a "Land acquisition policy," 25 C.F.R. 151.3, which provides for acquisitions in three circumstances: when the land is within or adjacent to an existing reservation, when the land is already owned by the Tribe, or when "the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(1)-(3). The regulations then set forth particular factors to guide the Secretary's decision whether to acquire such land, including "[t]he need of the individual Indian or the tribe for additional land" (25 C.F.R. 151.10(b)), "[t]he purposes for which the land will be used" (25 C.F.R. 151.10(c)), and, if the land is outside a reservation and is to be used for a tribal business purpose, "the anticipated economic benefits associated with the proposed use" (25 C.F.R. 151.11(c)).

U.S. at 104; *Lichter*, 334 U.S. at 778-779. To the same extent that legislative history may be useful to confirm the meaning of arguably ambiguous text in other contexts, see, *e.g.*, *Zedner* v. *United States*, 126 S. Ct. 1976, 1985-1986 (2006), so may it also serve that function in resolving a constitutional challenge on nondelegation grounds. And of particular relevance here, as noted above, this Court has repeatedly relied on the legislative history of the IRA in identifying its purposes and policies. See, e.g., *Mescalero Apache Tribe*, 411 U.S. at 152-154 (quoting H.R. Rep. No. 1804, *supra*, at 6); *New Mexico*, 462 U.S. at 335 n.17 (quoting same).

Additionally, petitioners err in suggesting (Pet. 21-22) that the legislative history demonstrates that Congress "stripped" Section 465 of any standards. To the contrary, Congress deliberately crafted the IRA to provide the Secretary with broad authority to implement the purposes of the Act—advancing tribal economic development, assisting tribal self-governance and restoring the ancestral tribal land base. See S. Rep. No. 1080, *supra*, at 1-2; accord H.R. Rep. No. 1804, *supra*, at 1, 6-7. As this Court has recognized, legislation through "broad general directives" is a necessary part of governance and is not constitutionally suspect. *Mistretta*, 488 U.S. at 372; *American Power & Light*, 329 U.S. at 105 ("legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation."). That is especially so with respect to the administration of Indian Affairs, involving the varying circumstances of a number of different Tribes. The court of appeals' reliance on the larger statutory and historical context in which the IRA was enacted,

including its legislative history, to determining whether the statute provides adequate guidance to the Secretary was proper and provides no warrant for this Court's review.

3. Petitioners' contention that the acquisition of lands in trust status by the Secretary impermissibly "invade[s] the jurisdiction of the State" (Pet. 25-26), provides no basis for granting the petition. Although petitioners correctly note that the Court stated in *Whitman* that the level of direction required of Congress will vary depending upon the nature of the power conferred, Pet. 25 (citing *Whitman*, 531 U.S. at 475), that principle *supports* the constitutionality of the delegation contained in Section 465. In an area in which the Executive has historically exercised expansive authority, such as the supervision of lands occupied by Indians,[7] broader authorizations are especially appropriate. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing that Congress may accord to the President a greater degree of discretion in the area of foreign affairs than would be acceptable if only domestic affairs were involved); *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (upholding a broad conferral of authority on various Indian Tribes to regulate the introduction of liquor into Indian country on the ground that limitations on Congress's authority are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter").

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[7] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

Nor is it exceptional that Congress determined in Section 465 to confer immunity on land held in trust for Indians from state taxation. "The policy of leaving Indians free from State jurisdiction and control" is one that "is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945); see also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168-173 (1973); *New Mexico*, 462 U.S. at 332-333.

Similarly, petitioners' complaint that "the acquisition of land in trust deprives the states and localities of their ability to zone, govern, regulate, or control the use of or development of any real or personal property" is not material to petitioners' constitutional claim that Section 465 lacks an "intelligible principle" to guide the Secretary's exercise of his authority under Section 465. Rather, petitioners' argument represents a disagreement with longstanding principles—embodied in the IRA and numerous other statues—that govern Indian lands and Indian self-determination. Against that background, Congress made an explicit policy determination to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465.

Finally, petitioners ignore that the Secretary's regulations promulgated by the Secretary to implement the purposes of Section 465 address the very concerns they raise here. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section] 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."). The regulations direct the BIA, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and

potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when, as was true in this case, the land to be acquired is held in unrestricted fee status, the BIA considers "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g). The court of appeals concluded that the BIA properly applied those regulations in this case, see Pet. App. 15-24, and petitioners do not challenge that ruling here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006

APPENDIX

Act of June 18, 1934, h. 576, 48 Stat. 984 (25 U.S.C. 641 *et seq.*) provides in pertinent part:

§ 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

§ 463. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall

not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

* * * * *

§ 464. [As amended by Pub. L. No. 109-221, § 501(b)(1), 120 Stat. 343-344.] Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: *Provided further,* That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108-374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further,* That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is

expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption for footnote style edittion

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * * * *

§ 469. Indian corporations; appropriation for organizing

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

§ 470. Revolving fund; appropriation for loans

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

§ 471. Vocational and trade schools; appropriation for tuition

There is authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans

to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

§ 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

* * * * *

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special

election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

* * * * *

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

* * * * *

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative

until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

§ 478. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

§ 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian

blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

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In The
Supreme Court of the United States

STATE OF SOUTH DAKOTA; CITY OF OACOMA, SOUTH DAKOTA; LYMAN COUNTY, SOUTH DAKOTA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; AURENE MARTIN, ACTING ASSISTANT SECRETARY, INDIAN AFFAIRS; BILL BENJAMIN, ACTING REGIONAL DIRECTOR, GREAT PLAINS REGIONAL OFFICE, BIA; CLEVE HER MANY HORSES, SUPERINTENDENT, LOWER BRULE AGENCY, BIA; JAMES McDIVITT, DEPUTY ASSISTANT SECRETARY, INDIAN AFFAIRS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion," to acquire lands "for Indians." The text of the Act contains no limitations on the exercise of the Secretary's discretion. As explained in the Petition, this standardless grant of discretion in an executive branch official to acquire land and convert it into Indian trust land constitutes an unconstitutional delegation of legislative power. As the Petition further explained, the consequences of the Secretary's unbridled power to acquire land "for Indians" is immense because the states' sovereign powers are significantly restricted on lands taken into trust under § 465. The United States' Brief in Opposition, far from contradicting these points, confirms that review of this case is warranted.

The United States proposes "intelligible principles" that purportedly set bounds on the Secretary's discretion. But, directly contrary to *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001), these "intelligible principles" appear nowhere in the statute. Running away from the plain text, the United States looks instead to the Secretary's own regulations and swatches of legislative history to divine some boundaries on the Secretary's discretion. Moreover, even on their own terms, the "intelligible principles" articulated by the United States are insufficient. They place no genuine limits on the Secretary's discretion to acquire, by any means, as much land as he wants, wherever he wants, for whatever reason he wants. The United States' effort to save the statute might have been plausible were the agency power at issue narrow in scope, such as, for example, defining the term "country elevators" in 42 U.S.C. § 7411(i). *See Whitman*,

531 U.S. at 475 (providing that example). That approach is manifestly impermissible when the agency power is as sweeping as is the Secretary's power here.

1. It is not disputed that when "Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis in original)). The "intelligible principles" in turn, set the "boundaries" of the "delegated authority." *See American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946). The United States proposes that the "intelligible principles" found within § 465 are that the Secretary may acquire land "when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base." U.S. Opp. 18-19. Those principles were not, however, laid down by *Congress*.

In *Whitman*, this Court declared that it had "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." 531 U.S. at 472. Nonetheless, the United States relies heavily, and nearly exclusively, on federal rulemaking to justify the constitutionality of § 465. Most tellingly, the United States turns to the text of the *regulation*, and not the text of the *statute*, to demonstrate that "Section 465 does not confer boundless discretion." U.S. Opp. 19; *see also* U.S. Opp. 4, 5, 6. The United States proudly trumpets its contention that the Secretary has "set[] out ascertainable standards that govern trust acquisition decisions." U.S. Opp. 20. One searches in vain, however, for any *statutory* limitation on the power to

acquire land "for the purpose of providing land for Indians."

The United States seemingly argues that a war powers case, *Lichter v. United States*, 334 U.S. 742 (1948), establishes that it is not necessary that a statute give "concrete expression" to "limiting principles" because this function can be accomplished by a mere regulation. U.S. Opp. 20. This thesis, however, is definitively undermined by the unambiguous holding of *Whitman* to the contrary.[1]

Finally, the federal treatment of the legislative history is quite revealing. As the Petition at 21-22 demonstrates, the original, carefully composed bill was entirely rewritten by its opponents, and it eliminated the restraints and checks in the statute. The United States, contrary to the main thread of its argument, embraces the heart of this thesis, asserting that the elimination of these restraints

[1] It bears adding that the regulations that purportedly "guide" the Secretary's discretion do not limit his plenary power. For example, 25 C.F.R. § 151.3(a)(2) allows the Secretary to take land into trust "[w]hen the tribe already owns an interest in the land." Therefore, to make land eligible for a trust acquisition, a tribe need only purchase the land. Further, the rules require only that the Secretary "will consider" certain other criteria. 25 C.F.R. § 151.10. The requirements, for example, that a BIA officer "consider" the "purposes" of the acquisition or the likely "jurisdictional" problems do not effectively limit the BIA's authority to take the land into trust. As a consequence, judicial review has largely focused on whether the BIA performed the ritual of "considering" the BIA factors. As found by the Eighth Circuit, the party challenging the BIA must "present evidence that the agency *did not consider a particular factor*; it may not simply point to the end result and argue generally that it is incorrect." Pet. App. 17. (Emphasis added.)

demonstrates the "broad authority" vested in the Secretary. U.S. Opp. 21. That is precisely the problem, however. The broad authority delegated in § 465 is utterly unbridled.

2. The "intelligible principles" and "boundaries" proposed by the United States fail on their own terms. A rule that the Secretary may acquire land "when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base" (U.S. Opp. 18-19) is empty of content and no limitation at all.

The purported "boundary" of allowing acquisitions for the purpose of "advancing tribal economic development" is no boundary with regard to location, purpose, or extent. As to location: the acquisition of lands for the small South Dakota tribe at issue in New York City, in California, in Hawaii, or in Nevada could certainly "advance" the tribe's economic development. As to purpose: land could be acquired for golf courses, strip joints, strip mines or apartment houses, or for any purpose, under this "boundary." And as to extent: the combined size of the acquisitions for the purpose of "advancing economic development" is unlimited, as illustrated by the career of John Rockefeller or, more recently, Donald Trump.

The "boundary" or "intelligible principle" of "restoring the ancestral tribal land base" fares no better. The undefined term "ancestral tribal land base" may mean all of the continental United States, since it was all part of the "land base" of some tribe. It may mean the 138,000,000 acres of Indian land holdings in 1887 as referred to in the United States' brief. U.S. Opp. 2. Alternatively, it might mean, for

South Dakota's tribes, any land which these tribes ever occupied. South Dakota's Native American population is mostly Sioux and some experts take the view that this tribe resided in the southeastern United States and migrated in approximately 1000 A.D. toward Minnesota. *See, e.g.*, Mary Davis, (ed.), *Native America in the Twentieth Century: An Encyclopedia* 299 (1994). The Sioux were living in Minnesota in the 1660's when they were contacted by the French (Wesley Hurt, *Sioux Indians II, Dakota Sioux Indians* (American Indian Ethnohistory, Plains Indians) 61-62 (1974)), and they thereafter moved into South Dakota. The Sioux, under this formulation, could have land taken into trust for their benefit in any states in which they resided on their way to South Dakota.

Cementing the absence of any true limits in the United States' proposed "intelligible principles" is the United States' use of the phrase "such purposes as." *See* U.S. Opp. 18 (the Secretary may acquire land under § 465 "when the acquisition would serve *such purposes as* advancing tribal economic development, ..." (emphasis added)). In other words, its three categories are merely illustrative and not comprehensive. The Secretary can presumably rely on others, though what these may be is unknown. What is known is that the United States' formulation lacks any realistic boundaries at all.

Finally, it is significant that the purported "intelligible principles" as articulated by the United States differ from the "intelligible principles" articulated in the Eighth Circuit's opinion, confirming that both are really manufactured. For the Eighth Circuit, a limiting purpose is tribal "self-support," Pet. App. 14; for the United States it is "advancing tribal economic development." U.S. Opp. 18-19. For the Eighth Circuit, a limiting purpose is "ameliorating

the damage" from the allotment policy, Pet. App. 14; for the United States it is "assisting tribal self-governance" (whatever that means) and "restoring the ancestral tribal land base." U.S. Opp. 19. For the Eighth Circuit, the two named factors completely define the "intelligible principle" found in the statute, Pet. App. 14; for the United States, as noted, the three "intelligible principles" are only illustrative – there are others, unknown and unidentified, contained within the term "such purposes as." U.S. Opp. 18.[2]

3. Were the scope of the power at issue as limited as defining the term "country elevator," perhaps the "intelligible principles" fabricated by the United States would suffice. But under *Whitman*, 531 U.S. at 475, the "degree of agency discretion that is acceptable varies according to the scope of power constitutionally conferred." *See* U.S. Opp. 22. Under § 465, the Secretary has been granted the sweeping power to take land into trust on or off reservation, and for any purpose, at any location, and without limit. Accordingly, Congress "must provide substantial guidance," *Whitman*, 531 U.S. at 475, on the exercise of that power. It has not.

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[2] Also pending before this Court is a Petition for Writ of Certiorari in the case of *State of Utah v. Shivwits Band of Paiute Indians*, No. 05-1160 (Petition for Writ of Certiorari filed March 9, 2006). The Court of Appeals in that case pronounced still a third different rendition of the intelligible principles or boundaries, including, inter alia, that of " 'rehabilitating the Indian's economic life' and 'developing the initiative destroyed by . . . oppression and paternalism' of the prior allotment policy"; a further limit was that the Secretary "must assure continued 'beneficial use by the Indian occupant and his heirs.' " *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972 (10th Cir. 2005) (quoting *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999)).

The United States argues that the power granted the Secretary is not broad for purposes of the *Whitman* rule because "the supervision of lands occupied by Indians" is "an area in which the Executive has historically exercised expansive authority." U.S. Opp. 22. That is a non-sequitur. There is *no* tradition of the United States supervising *off reservation* lands acquired in fee by tribes and individual Indians – the type of lands at issue in this very case. Moreover, the federal government's supervision of some Indian lands hardly lessens the broad impact of a congressionally-delegated power to deprive states of their sovereign powers over unknown additional amounts of off-reservation land. That impact can be felt by states and local governments in numerous ways.

When a tribe or an individual Indian acquires land in fee, it neither deprives states and localities of their authority to tax the lands, nor divests the states and localities of their historical criminal, civil, and regulatory powers over the lands and their inhabitants. This changes when those lands are taken into trust under § 465. All power to impose property taxes on the property is lost under the terms of the statute itself. 25 U.S.C. § 465 ("lands or rights" acquired in trust "shall be exempt from State and local taxation"). And under 25 C.F.R. § 1.4(a) each acquisition of land in trust has the immediate effect of invalidating the application of any state or local "laws, ordinances, codes, resolutions, rules or other regulations" which have the effect of "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights. . . ."

Some courts, moreover, have even found that the Secretary's acquisition of off reservation land in trust has the legal effect of converting that land into "Indian

country" with the corresponding loss of criminal and civil jurisdiction to the states and local units of governments. *See, e.g.*, *United States v. Roberts*, 185 F.3d 1125, 1131-1133 (10th Cir. 1999). The United States, relying, *inter alia*, on this Court's decisions in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 450, 453 n.2 (1995), *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) and *United States v. John*, 437 U.S. 634, 648-49 (1978), has consistently taken this position. *See, e.g.*, Brief for the Federal Appellees at 35-43, *State of South Dakota and Moody County, South Dakota v. United States Department of the Interior* (8th Cir.) (No. 06-1150).

The immediate threat to the states and local units of government is intensified because of the bonanza of gaming funds flowing into tribal coffers. The Petition identified net tribal gaming revenues of 19.4 billion dollars in *2004*. Pet. 27. The *2005* revenues, recently disclosed, indicate net tribal gaming revenues of 22.6 billion dollars, an increase of over 16 percent in a single year. *See* www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/TribalGamingRevenues05.pdf. Sixty operations now annually net 100 million dollars or more each, providing an enormous source of revenue for the purchase of lands. As noted, the mere purchase of land by a tribe makes the land eligible for trust status consideration. *See* 25 C.F.R. § 151.3(a)(2) ("land may be acquired for a tribe in trust status . . . [w]hen the tribe already owns an interest in the land.") *See also*, note 1, *supra*.

Had Congress carefully circumscribed the Secretary's discretion in converting land into trust lands for Indians, these deep inroads on state sovereignty might have been tolerable under the Constitution. As detailed above, however, even under the United States' reading of § 465,

the Secretary of the Interior is empowered to invade the jurisdiction of the states and local units of government for virtually any purpose, at any place, and by acquisitions of land in any amount. Nothing in the statute or in the federal description of its boundaries would prohibit the taking into trust of the whole of a neighborhood, suburb, city, county or even a state. This unbridled delegation of sweeping legislative power is utterly inconsistent with our structure of government, and warrants review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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